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REPORTS

OF

CASES

DETERMINED AT

NISI PRIUS,

IN THE COURTS OF

King's Bench and Common Pleas,

AND ON

THE HOME CIRCUIT,

FROM THE

Sittings after MICHAELMAS TERM, 48 GEO. III. 1807,

TO THE

Sittings after MICHAELMAS TERM, 49 GEO. III. 1808,

BOTH INCLUSIVE.

BY JOHN CAMPBELL, ESQ.
OF LINCOLN'S INN, BARRISTER AT LAW.

Si de interpretatione legis quæratur; in primis inspiciendum est, quo jure civitas retro in ejusmodi casibus usa fuisset. PAND. L. I. t. 3.

VOL. I.

LONDON:
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1809.

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IN now preſenting to the public a complete volume of Niſi Prius Reports, I conſider it unneceſſary to ſay any thing by way of preface to the work. My plan may be beſt underſtood from the manner in which it is executed; and if my labours are in general deemed worthy of approbation, I know it is ſuperfluous to beſpeak indulgence for occaſional blemiſhes. But I eagerly embrace the opportunity to expreſs my ſenſe of the aſſiſtance and kindneſs I have received from all the branches of the profeſſion in the proſecution of this undertaking, and more particularly to teſtify the gratitude I feel for the cheering encouragement which has been extended to me by the illuſtrious Judge by whom the far greater part of the following Caſes were determined.

J. C.

INNER TEMPLE,
April 19, 1809.

A

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ERRATUM.

P. 282, l. 1, for defendants, read plaintiffs.

DIRECTION TO THE BINDER.

[a] to be placed between N and O.

CASES

ARGUED AND RULED AT

NISI PRIUS

IN K. B.

At the Sittings after Michaelmas Term,

48 GEORGE III. 1807.

SITTING DAY AFTER TERM IN LONDON.

WEDDERBURN AND OTHERS *v.* BELL.

Tueſday, Dec. 1.

ASSUMPSIT on a policy of inſurance, on goods on board the Minorca, at and from Jamaica to London, at a premium of ten guineas per cent. to return 5*l.* per cent. if the ſhip ſailed from the place of rendezvous with convoy for the voyage and arrived. The firſt count of the declaration laid the loſs to be by the barratry of the maſter; the ſecond, by the perils of the ſea.

A ſhip, to be ſea-worthy, muſt be rendered as ſecure as poſſible from *capture*, as well as from the perils of the ſea.

The ſhip ſailed for England with convoy in the end of July 1806. On the 12th of Auguſt ſhe parted from the fleet, and being never more heard of, was ſuppoſed to have foundered in a hurricane, which immediately followed.

The defence reſted on two grounds; firſt, that the ſhip on the homeward-bound voyage was not properly equipt with ſails; and 2dly, thatſhe had not a ſufficient crew. It appeared in evidence, that her ſails to be uſed in ſtormy weather were in good condition; but that her main-top-gallant-ſail and ſtudding-ſails, which are uſeful in light breezes, were extremely rotten, and almoſt quite unſerviceable.—The evidence concerning the crew was contradictory.

The *Attorney General* for the plaintiffs contended, that the decayed ſtate of the top-gallant-ſail and ſtudding-ſails could not conſtitute any want of ſea-worthineſs; as they were not at all eſſential to the ſafety of the ſhip, and could only be uſed in calm weather to quicken her ſpeed. All that the doctrine of ſea-worthineſs required was, that at the time of the inſurance the ſhip ſhould be fit to perform the voyage, unleſs some external accident intervened. The Minorca was clearly in a condition to do this, notwithſtanding the ſuppoſed deficiency in theſe ſails; and in fact the loſs had not been at all occaſioned by the want of them, but by the hurricane, in which they would have been uſeleſs.—The weight of teſtimony he maintained was in favour of the ſufficiency of the crew, and beſides, it was often impoſſible to procure hands in the [illegible] Indies upon any terms.

[illegible] ELLENBOROUGH.—In an action of this kind, [illegible]intiffs are bound to prove, not only that the ſhip [illegible]s tight, ſtaunch, and ſtrong, but that ſhe was properly equipt with ſails, and other ſtores, and that ſhe was manned with a ſufficient crew to navigate her on the

voyage inſured. Theſe are conditions precedent to the policy attaching; and if they were not complied with, ſo that the peril was enhanced; from whatever cauſe this might ariſe, and though no fraud was intended on the part of the aſſured, the underwriters may anſwer, "we are not liable." The hull of the ſhip in this caſe was ſufficient and ſea-worthy; but it appears, that when ſhe left Jamaica, her ſails were highly defective. It is not enough that a ſhip is ſupplied with ſuch ſails as are eſſential to her ſafety from the perils of the ſea, and which might enable her, if not intercepted, from at ſome period or other completing her voyage. A perſon who underwrites a policy upon her has a right to expect that ſhe ſhall be ſo equipt with ſails, that ſhe may be able to keep up with the convoy, and get to her port of deſtination with reaſonable expedition. She muſt be rendered as ſecure as poſſible from capture by the enemy, as well as from the dangers of the winds and waves. But here the Minorca appears to have been deficient in ſails, on which her ſpeed might materially depend; and if ſo, the riſk being thereby greatly increaſed, the policy never attached, and this action cannot be ſupported. His Lordſhip was alſo of opinion, upon weighing the teſtimony on the one ſide and on the other, that the crew was inſufficient.

The defendant had a verdict.

The *Attorney General*, *Garrow*, and *Taddy*, for the plaintiffs.

Park and *Ker* for the defendant.

[Attornies, *Palmer* and Co. and *Gregge* and Co] *

Vide Lee *v.* Beach, Sittings after M. T. 1762, Marſhall, 368.—Oliver *v.* Cowley, Sittings after T. T. 1765, Ib. 369.—Mills *v.* Roebuck, in the Excheq. Park, 222.—Law *v.* Hollingſworth, 7 T. R. 160.

* [As the ſtatements of pleadings and of facts in theſe notes muſt often be imperfect, and may ſometimes be inaccurate, I have thought it right to ſubjoin the names of the attornies on both ſides from the CHIEF JUSTICE's paper. Thus, upon any doubt ariſing, the briefs in the cauſe may be eaſily inſpected, and an opportunity is given to verify the report, or to rectify the miſtakes with which it may be chargeable.]

ADJOURNED SITTINGS AT WESTMINSTER.

Thurſday Dec. 3.

THOMPSON *v.* BOND.

If a man, by a falſe repreſentation, induces another to ſupply goods on the credit of a third perſon, and enters into a collateral undertaking, not in writing, to pay for them, he is not liable as for goods ſold, but muſt be ſued in an action of deceit.

ASSUMPSIT for work and labour, goods ſold, &c. Plea, the general iſſue.

In this action the plaintiff, who is a publican, ſought to recover the ſum of 45*l.* for having, during the laſt Weſtminſter election, at the inſtance of the defendant,

employed

employed himſelf in canvaſſing for THE RIGHT HONOURABLE R. B. SHERIDAN, one of the candidates, and opened his houſe for the entertainment of voters in the intereſt of that gentleman.

It was not denied that the defendant had ſolicited him to do this, and had promiſed to ſee him paid; but it was contended, notwithſtanding contrary evidence on the other ſide, that he had given credit in the firſt inſtance to Mr. Sheridan's committee, and that the defendant's undertaking, being a collateral promiſe to pay the debt of another and not being reduced into writing, was void under the *ſtatute of frauds* (*a*). In proof of this, it appeared that the defendant, after telling the plaintiff that he had authority from the committee to open his houſe, brought down one of Mr. Sheridan's flags, which was diſplayed from the windows during the election; and that the plaintiff afterwards ſent in his bill to the committee, before making any demand upon the defendant, and wrote him a letter, requeſting his good offices to get it diſcharged. A witneſs having ſworn, that he believed the defendant was himſelf a member of the committee, ſo that he might ſtill have been liable as one of thoſe to whom credit was originally given (*b*), a Mr. Froſt, who had acted as chairman, was called and negatived that fact.

(*a*) 22 Car. 2. c. 3. § 4. (*b*) Stephens v. Squire, 5 Mod. 205.

On his croſs examination he ſaid, that the committee had never authorized the defendant to engage the plaintiff, or to open his houſe on behalf of Mr. Sheridan; but had merely, upon his aſſuring them that there were twelve electors there diſpoſed to vote for Mr. Sheridan, deſired him to take a flag and bring them up to poll. Upon this,

The *Attorney General* argued, that whatever might have originally paſſed between the parties, the plaintiff was now at all events entitled to recover the whole of his demand. Suppoſe he had given credit to the committee, ſtill as they had not authorized the defendant to act as he had done, they were not liable; and as it was certain that an action muſt lie againſt ſome one, this was the debt of the defendant alone, and he was perſonally reſponſible for it in the preſent action.

Lord ELLENBOROUGH.—The undertaking of the defendant ſeems to have amounted to this, that he would ſee the plaintiff paid, which in conſideration of law is only a collateral promiſe to pay the debt of another; and had he been authorized by the committee, as he repreſented, ſo that they would have been liable, it would, beyond all queſtion, have been void, for not being reduced into writing. But it now appears that he had no orders from the committee to open the houſe, and that he had no authority as their agent to employ the plaintiff. Still, I am of opinion, that the plaintiff cannot inforce his demand in the preſent action. If I repreſent that I have an order from A. when I have no ſuch order, and ſo induce a perſon to deal

deal with me on the credit of A., I am not principally liable as for a debt of my own. An action may be brought againſt me for the deceitful repreſentation, by which this perſon was induced to give credit to A.; but he cannot recover as upon a contract which was never entered into. So here, though the defendant may be liable in a different form of action, he cannot be conſidered as a debtor for goods ſold to the extent of the plaintiff's demand. As it appeared, however, that the defendant himſelf frequently partook of the refreſhments in the plaintiff's houſe during the election, it will be neceſſary to decide whether theſe were furniſhed to him on his own perſonal credit, or on the general repreſentation that the committee deſired the houſe to be opened for the candidate's friends. In the former caſe, the defendant will be liable in this action to the amount of his own conſumption; but in the latter, which, under the circumſtances ſeems the more probable caſe, he is entitled to a verdict on the whole declaration.

The Jury found a verdict for the plaintiff with 10*l.* damages.

The *Attorney General*, *Garrow*, and *Lawes* for the plaintiff.

Park and *Topping* for the defendant.

[Attornies, *Stevenſon* and *Henſon*.]

Vide Anderſon *v.* Hayman, 1 H. Bl. 120. and Matſon *v.* Wharam, 2 T. R. 80.

Thurſday, Dec. 3.

CLUNNES *v.* PEZZEY.

Where there has been no fraud on the part of the defendant, the preſumption of law is againſt the demand of the plaintiff.

ASSUMPSIT for goods ſold and delivered, at the ſuit of a liquor merchant. The only evidence reſpecting the goods was that of his ſervants, who ſpoke to the delivery of ſeveral hampers of full bottles at the defendant's houſe; but as to the contents of the bottles they were altogether ignorant.

Lord ELLENBOROUGH directed the Jury to preſume that the bottles were filled up with the cheapeſt liquor, in which the plaintiff dealt, viz. porter; and they awarded damages upon that ſcale accordingly.

But if the defendant has been guilty of fraud, and ſuppreſſes the means of aſcertaining the truth, the preſumption is in favour of the plaintiff's demand. Thus in Armory *v.* Delamorie, 1 Str. 505. where a goldſmith had taken a jewel from a chimney ſweeper's boy, who had found it, and returned him the ſocket in which it had been ſet; in trover to recover the value of it, ſeveral in the trade were examined to prove what a jewel of the fineſt water that would fit the ſocket would be worth; and Pratt C. J. directed the Jury, that unleſs the defendant did produce the jewel, and ſhew it not to be of the fineſt water, they ſhould preſume the ſtrongeſt againſt him, and make the value of the beſt jewels the meaſure of their damages; which they accordingly did.

SMITH *v.* RUMMENS.

Sime day.

ASSAULT and falſe impriſonment. Plea, the general iſſue of *not guilty*.

If A. is convicted before a magiſtrate on the evidence of B.; although B.'s name does not appear on the conviction, he cannot avail himſelf of it in any civil proceeding between him and A.

On the part of the plaintiff it was proved, that as he was driving a truck or wheelbarrow along the foot pavement in Warren-ſtreet, in the pariſh of St. Pancras, on the 4th day of July laſt, he was met by the defendant, who ſeized hold of him and detained him for ſome time in cuſtody.—The defendant now juſtified his conduct under ſtat. 12 Geo. 3. c. 69. *for paving, lighting, &c. ſuch part of the pariſh of St. Pancras, as lies on the weſt ſide of Tottenham-court-road*; whereby it is enacted, "that if any perſon ſhall carry, run, drive, or draw, on any of the foot pavements within that part of the pariſh any wheel or wheels, ſledge, wheelbarrow, or any carriage whatſoever, it ſhall be lawful for any perſon or perſons whatſoever, who ſhall ſee ſuch offence committed, to ſeize the offender, and without any other warrant, to convey and deliver him into the cuſtody of a peace officer, in order to be ſecured, and conveyed before a juſtice of the peace; who is required to proceed to examine upon oath any witneſs who ſhall appear to give information touching ſuch offence; and the party accuſed on conviction, ſhall forfeit the ſum of 10*s.* for the firſt time of offending, and the ſum of 20*s.* for the ſecond time of offending, &c." This is declared to be

be a public act; and in an action brought for any thing done under it, the defendant may plead the general iſſue, and give the ſpecial matter in evidence.

To prove that the plaintiff on the above occaſion had been guilty of an offence againſt the ſtatute, and that the defendant had been acting under its authority, a clerk from the public office in Bow-ſtreet was called, and produced a conviction which had taken place there before A. Graham, Eſq.; by which the plaintiff, for driving a truck on the foot pavement in Warren-ſtreet, had been adjudged to pay a penalty of 10s.—The witneſs being aſked, on whoſe information Smith had been convicted, ſaid, on that of Rummens the defendant.

Garrow and *Peake* upon this, objected to the conviction being read as evidence. They relied chiefly upon the caſe of Rex *v.* Boſton (*a*), where B. having indicted A. for perjury in an anſwer to a bill in equity filed for a diſcovery and injunction in an action depending between them; it was held, that B. was a competent witneſs to prove the perjury; *as he could not avail himſelf of the conviction of A. in any civil proceeding between them, either in law or equity.*

The *Attorney General* contra, inſiſted that the conviction was admiſſible evidence, as the adjudication of a court of competent authority. He did not produce it as evidence of what had been ſworn before the magiſtrate; nor did it appear on the face of the con-

(*a*) 4 Eaſt, 572.

viction

viction who had been the informer. There was no objection to the plaintiff repelling the charge before he was convicted; as he might have adduced all the evidence of which he was in poſſeſſion at Bow-ſtreet; and the conviction muſt now be received as proof that he was guilty of the offence imputed to him.

Lord ELLENBOROUGH.—I cannot receive the conviction as an adjudication of the plaintiff's guilt. Although it follows the words of the act of parliament, and no informer's name appears on the face of it, yet, in point of fact, it took place on the information of the defendant. Therefore, now to admit it for the purpoſe propoſed, would be to allow him to ſwear in his own cauſe. However, I think, it may be read to ſhew that the defendant was acting in the courſe of his duty, and not from malice to the plaintiff.

The conviction was accordingly read; but it appeared to be for an offence committed on the 27th of June; whereas the aſſualt and falſe impriſonment ſpoken to by the plaintiff's witneſſes, took place on the 4th of July;—on which day, although the plaintiff had again driven his truck along the foot-pavement, the defendant had not ſtrictly followed the mode of bringing him to juſtice preſcribed by the act.—The parties, therefore, on the recommendation of Lord Ellenborough, agreed that there ſhould be a verdict for the plaintiff with 40*s.* damages.

Garrow and *Peake* for the plaintiff.

The

The *Attorney General* and *Pitcairn* for the defendant.

[Attornies, *Venner* and *Bonney*.]

Vide Richardſon *v.* Williams, 12 Mod. 319.—Gibſon *v.* M'Carty, Caſ. temp. Hard. 311.—Rex *v.* Whiting, Salk. 283.—Bul. N. P. 245.—Gilb. Law. Ev. 30.—Rex *v.* Dalby, Peak. Caſ. 12. and Hathaway *v.* Barrow, *poſt*.

Same day.

MADDEN *v.* KEMPSTER.

If a man gets poſſeſſion of a thing by miſrepreſentation, he cannot retain it, as having a lien upon it; although, under the circumſtances, he might have done ſo, had he come by it fairly.

Semble. That if A. is under acceptance to B. he may retain money of B.'s in his hands to diſcharge it, either until the bill is delivered up to him, or until he receives a bond of indemnity againſt being ſued upon it.

ACTION for money had and received, to recover the ſum of 60*l*.—The plaintiff is a marine agent at Portſmouth; the defendant carries on the ſame buſineſs in London. In February laſt, captain Hart, an officer in the marines, took his concerns out of the hands of the defendant, and placed them in thoſe of the plaintiff. The defendant in the preceding December had, for the accommodation of captain Hart, accepted a bill for 60*l*. at four months. On ceaſing to be employed by him, he went to Meſſrs. Abrahams and Rice, attornies in town, and agents of the plaintiff, and repreſented to them, that there was *a balance* of 60*l*. due to him from captain Hart. Upon this, they gave him a cheque for the money on the plaintiff's banker, which was regularly paid. It appeared that the payee of the bill accepted by the defendant, had delivered it back to Hart, on receiving another in its ſtead; and the witneſſes ſwore, they believed it was at that time cancelled or deſtroyed. Abrahams and Rice repeatedly ſtated theſe facts to the defendant, and preſſed him to return the 60*l*.; but he refuſed

to

to part with it, unleſs he had a bond of indemnity from the plaintiff. They offered him a verbal undertaking, that he ſhould never be ſued upon the bill; but he inſiſted upon a ſecurity under ſeal.

The *Attorney General* for the defendant, contended, that he had an undoubted right to this, and was juſtified in retaining the money until he obtained it. He was not to rely upon the aſſurance given him that his acceptance was deſtroyed; and if not delivered up to him, he ought to have been fully indemnified againſt its being in circulation; as he ſtill was anſwerble upon it to a *bonâ fide* holder.

Lord ELLENBOROUGH.—The defendant being under an acceptance to captain Hart, whoſe agent he had been, might have retained a ſum of money to anſwer that acceptance. But the plaintiff is entitled to recover this ſum of money, the defendant having obtained it by miſrepreſentation. He mentioned nothing of the acceptance; he obtained it as *a balance*, when no ſuch balance was due to him. He therefore cannot ſet up the lien, to which he might otherwiſe have been entitled.

Verdict for the plaintiff, damages 60*l.*

Garrow and *Comyn* for the plaintiff.

The *Attorney General* for the defendant.

[Attornies, *Rice* and *Finmore.*]

Vide Crockford *v.* Winter, *poſt.*

AMEY

Friday, Dec. 4.

AMEY *v.* LONG.

Although a paper may be in the legal cuſtody of A., if it is in the actual poſſeſſion of B., *he* is bound to produce it, under a *ſubpœna duces tecum.*

ACTION on the caſe for not producing a paper under a *ſubpœna duces tecum.*—The plaintiff, Mrs. Elizabeth Amey, having obtained a judgment againſt Samuel Glover, on the 13th of May 1806, ſued out a *non omittas teſtatum fieri facias* to levy the ſum recovered, directed to the ſheriff of Surrey. To this writ the ſheriff returned *nulla bona*; and the plaintiff brought an action againſt him for a falſe return. The cauſe ſtood for trial at the Sittings after Michaelmas Term 1806.

The warrant from the ſheriff to levy on Glover's goods had been directed to one Grace, who carries on buſineſs with the defendant Long, likewiſe a ſheriff's officer. To compel the production of the warrant at the trial (*a*), the plaintiff ſued out a *ſubpœna duces tecum*, directed to Grace and Long in the uſual form, and which commanded "them, or one of them, to produce and ſhew forth at the time and place aforeſaid, a certain warrant granted to them, or one of them, by the ſheriff of Surrey, upon a certain writ of non omittas teſtatum fieri facias iſſued out and under the ſeal of the court of King's Bench, on or about the 13th day of May laſt, between Eliza Amey plaintiff, and Samuel Glover defendant." This

(*a*) Drake *v.* Sykes, 7 Eaſt, 113.—Lloyd *v.* Harris, Peak Caſ. 174.

writ

writ was ſerved upon the defendant in the month of October; but was never ſerved upon Grace at all.

At the trial the defendant appeared as a witneſs, but would not produce the warrant; and on the contrary, ſwore poſitively that he neither had it in his poſſeſſion, nor knew any thing of it. Grace was called upon the ſubpœna; but did not appear. In conſequence of this, the plaintiff was nonſuited, and was obliged to pay 52*l.* 10*s.* coſts to the other ſide, while her own coſts in the cauſe amounted to 80*l.*

It is not a fatal variance from a record, to omit the *deſcription* of a perſon named in it, unleſs ſome ambiguity is thereby produced.

The record in the cauſe of Amey againſt Smith being put in, the Attorney General of counſel for Long the defendant, objected that there was a variance between it and the declaration. The record in reciting the judgment againſt Glover, deſcribes him as "Samuel Glover the younger," but the declaration ſtyles him only "Samuel Glover," as the *ſubpœna* there ſet out commands the production of a warrant granted by the ſheriff of Surrey upon a *fieri facias*, "between Eliza Amey plaintiff, and Samuel Glover defendant." Now Samuel Glover, and Samuel Glover the younger, muſt be taken to be two diſtinct perſons, and the cauſe, of which this is the record, is different from the cauſe referred to in the preſent declaration.

Lord ELLENBOROUGH over-ruled the objection. He ſaid the *ſubpœna* as ſet out in the declaration did not give Glover his full deſcription; but it did not give him a wrong deſcription. Had there been two cauſes in which there were two perſons defendants of the

ſame

ſame name, differently deſcribed, ſome ambiguity would have ariſen from the omiſſion, and the objection might have been fatal.

It is not a preliminary objection to an action for not producing a paper under a *ſubpœna duces tecum*, that the defendant had ſworn at the trial, that he had it not in his poſſeſſion, and knew nothing of it.

The *Attorney General* afterwards took another objection, on the ground, that the defendant at the former trial had ſworn that he had not the warrant in his poſſeſſion, and that he knew nothing of it. The only remedy againſt him, he contended, was an indictment for perjury, and this was not the proper mode of trying his veracity. As well might an action be brought againſt a witneſs for withholding certain oral teſtimony, which it may be imagined, he could have diſcloſed. Thus, actions to recover damages would in all caſes of this kind, be ſubſtituted for indictments to puniſh the crime of perjury.

Lord ELLENBOROUGH, however, obſerved, that if a man commits a miſdemeanour, the perſon who is injured by the offence, is not in every caſe to be driven to proceed againſt him criminally, but may maintain a civil action for damages. There were various actions well known in the law (as for maliciouſly holding to bail, &c.), wherein perjury was imputed to the defendant, for which he was liable to be indicted.

Wm. Winſtandly was then called, on whoſe evidence the cauſe chiefly turned. He ſwore, that in October 1806 he was arreſted by Grace, and carried to the defendant's lock-up-houſe: while there, he ſaw a paper lying in one of the windows with the name of Glover written upon it, and on examining it, he found

that

that it was a warrant from the ſheriff of Surrey directed to Grace, commanding him to levy on Glover's goods at the ſuit of Mrs. Amey. After the nonſuit, he accidentally met the defendant, and aſked him why he did not produce the warrant; when the defendant did not deny that he had it, but boaſted of having beat the plaintiff, and offered to lay a wager they ſhould beat her again, if ſhe brought another action.

The Attorney General, in his addreſs to the jury, contended that the warrant was not in the *legal cuſtody* of the defendant; who was therefore not bound to produce it. Being directed to Grace alone, it was his property; *he* was always entitled to it, and it remained in his legal cuſtody, however it might for a ſhort time be in the hands of the defendant. Beſides, Grace uſed the defendants lock-up houſe, and there kept his warrants. The *ſubpœna duces tecum* ought therefore to have been ſerved upon *him*; and if *he* had not produced the warrant under it, *he* would have been liable for the conſequences of the nonſuit. But as things actually ſtood, the plaintiff's only remedy was againſt her own attorney, from whoſe negligence the miſchief had ariſen.

Lord ELLENBOROUGH. Although a paper ſhould be in the legal cuſtody of one man, yet if a *ſubpœna duces tecum* is ſerved on another, who has the means to produce it, he is bound ſo to do; as far as ſuch a *ſubpœna* can compel the production of papers; and if that be a queſtion, it is upon the record, and will be decided elſewhere. The defendant, ſwearing in

his own exculpation, denied all knowledge of the warrant; but that is no bar to the plaintiff's right to recover; as perjury is often collaterally tried in other actions. The only queſtion here to be conſidered is, whether the defendant had the warrant in his cuſtody, with the capacity of producing it. If it was in his power to have done ſo, and he did not, it is not to be endured that by any contrivance between him and Grace, neceſſary evidence ſhould be withheld, and the purpoſes of juſtice ſhould be defeated.—In commenting on the evidence, his lordſhip laid particular ſtreſs on the circumſtances of the defendant, not denying to Winſtandly that he had the warrant in his cuſtody, and Grace not being called to prove, if that was conſiſtent with truth, that *he* was excluſively in poſſeſſion of the warrant at the time of the trial and when the ſubpœna was ſerved.

Verdict for the plaintiff, damages 132*l.* 10*s.*

Park, *Marryat* and *Pell*, for the plaintiff.

The *Attorney General* and *Garrow* for the defendant.

[Attornies, *Pitcher* and *Rogers*.]

Vide Miles *v.* Dawſon.—1 Eſp. Caſ. 405.—Leeds *v.* Cooke.—Peak. Law Ev. Appendix xxxix. and Tidd's Practice, 736. 3d edition.

TINSON *v.* FRANCIS.

Same day.

ASSUMPSIT on a promiſſory note, at the ſuit of the indorſee againſt the maker.—A *primâ facie* caſe being made out by the plaintiff, it was proved on the part of the defendant, that the note was given by him to accommodate a perſon of the name of Ticken, the payee; that it remained in the hands of the latter, till after it became due; that he then gave it to a Mr. Stevens, an attorney, to be returned to the defendant, and that Stevens indorſed it to the plaintiff.

Although the *bonâ fide* holder of a promiſſory note, made without conſideration, himſelf gave a full conſideration for it; yet if he took it after it was due from an indorſer, who had given none, he cannot maintain an action upon it againſt the maker.

The *Attorney General* for the plaintiff ſaid his client was not at all aware of the circumſtances under which the bill had been originally made, or had come into the hands of Stevens, and there were ſeveral witneſſes to prove that he had given Stevens a full conſideration for it.

Lord ELLENBOROUGH.—After a bill or note is due, it comes diſgraced to the indorſee, and it is his duty to make inquiries concerning it. If he takes it, though he gives a full conſideration for it, he takes it on the credit of the indorſer, and ſubject to all the equities with which it may be incumbered.

Verdict for the defendant.

Attorney General and *Wigley* for the plaintiff.

Garrow and *Park* for the defendant.

[Attornies, *Wybourn* and *Hurd.*]

It is ſaid to have been held by the Court of K. B. in Colombies *v.* Slim, Trin. 12 G. 3, Chitty on bills, 98, that an indorſement, after action brought on a note overdue, would nevertheleſs give the indorſee right of action, unleſs he had expreſs notice of the action: and in Brown *v.* Davis, 3 T. R. 83, Lord KENYON thought that to take away the right of the indorſee to recover, it muſt appear on the face of the note to be diſhonoured, or knowledge muſt be brought home to him, that it had been ſo: but in this laſt caſe, ASHURST and BULLER, Juſtices, were of opinion, that in an action againſt the maker of a promiſſory note, by a perſon who has taken it, after it was due, the defendant is entitled to ſet up the ſame defence he might have done againſt the original payee; and in Boehm *v.* Sterling, 7 T. R. 429, Lord KENYON himſelf ſeems to have ſubſcribed to this doctrine;—which, without injuring the circulation of negotiable ſecurities, is certainly the beſt calculated to guard againſt fraud and colluſion.

Same day.

DOE *ex d.* HOLLAND *v.* WORSLEY.

A proviſo in a leaſe not to aſſign or otherwiſe part with the premiſes for the whole or any part of the term, is broken by an underleaſe as well as an aſſignment.

EJECTMENT to recover the poſſeſſion of certain premiſes in South Audley Street.

By indenture bearing date 29th October, 1805, the leſſor of the plaintiff demiſed the premiſes for 23 years to one William Bennett, with the following proviſo, that,

that, " If the ſaid William Bennett, his executors or adminiſtrators, do or ſhall aſſign, or otherwiſe part with this indenture of leaſe, or the premiſes hereby demiſed, or any part thereof, for the whole or any part of the term hereby granted, to any perſon or perſons whomſoever, without the licence and conſent in writing, of the leſſor firſt had and obtained for that purpoſe," the leſſor might re-enter, &c.—On the 21ſt January, 1806, Bennett entered into an agreement with the defendant, to grant him a leaſe of the premiſes for the reſidue of the term, reſerving a few days, under which poſſeſſion was given.

Garrow for the defendant contended, that this was a proviſo only againſt an aſſignment; and relied upon the caſe of *Cruſoe* v. *Bugby* (*c*), where the like conſtruction had been put upon words ſcarcely to be diſtinguiſhed from the preſent; the covenant there being, that the leſſee " ſhould not nor would at any time or times during the demiſe, aſſign, transfer, or ſet over, or otherwiſe do or put away the indenture of demiſe, or the premiſes thereby demiſed, or any part thereof, to any perſon or perſons whomſoever."

Lord ELLENBOROUGH, however, held that though the covenant in *Cruſoe* v. *Bugby* extended only to an aſſignment, the words here muſt be taken to include an under-leaſe.

The leſſor of the plaintiff had a verdict.

(*c*) 3 Wilſ. 234.

The *Attorney General* and —— for the leſſor of the plaintiff.

Garrow and *Marryat*, for the defendant.

[Attornies, *England* and *Wilkinſon*.]

Vide Roe ex d. Gregſon v. Harriſon, 2 T. R. 425. Doe ex d. Mitchinſon v. Carter, 8 T. R. 57. 300.

Saturday, Dec. 5.

The MAYOR, &c. of London *v.* LONG, Eſq.

The words of a grant from the crown, by co-temporaneous expoſition and conſtant uſage, may be extended beyond their natural import, ſo as to confer a right to exerciſe an office within a city and the liberties thereof, granted only to be exerciſed within the city.

THIS was an action by the Corporation of London, againſt the defendant, repreſenting the London Dock Company, for diſturbing them in exerciſing the office of *Gauger* within the London Docks. The firſt count ſtated the plaintiffs to be entitled to the office and occupation of gauger, within the city of London, and the port of the ſaid city, of all wines, oils, and other merchandizes and things gaugeable therein, at any time coming thereto. The 2d count was the ſame, only ſaying they were entitled to the *gauging* of articles within theſe limits. The 3d and 4th, differing like the two former, claimed the right within the city *and the liberties thereof*. The two laſt counts confined the claim to the city itſelf.—Plea, the general iſſue of not guilty.

After

After ſome formal proof, there was put in an office copy of an inrolment in the Exchequer of a charter of 14 Charles I. This contains an *inſpeximus* of a charter of 18 Edward IV., whereby the king "grants and confirms to the Mayor and Commonalty and Citizens of the city of London, and their ſucceſſors, the office, occupation and exerciſe, of gauging all wines, oils, and other merchandizes and things gaugeable *within the city aforeſaid* (*a*), at whatſoever time brought or coming to that city."

It was admitted by the counſel for the plaintiffs, that the London Docks are not within the city of London; but they propoſed to ſhew, that the corporation had conſtantly exerciſed the office of gauger on all wharfs in the river Thames, as well without as within the city; and that the grant therefore was not to be limited to the city ſtrictly ſo called, but extended to the liberties of the city.

Beſt, Serjeant, for the defendant, objected to the admiſſibility of this evidence, as explanatory of the meaning of the charter. He allowed that uſage might *limit* the general words of an old grant; but it could not be given in evidence to *extend* the grant. The words here were clear, and confined the privilege within the walls of the city.

Lord ELLENBOROUGH.—We may receive evidence not only of what is comprehended within the *civitatem*

(*a*) Infra civitatem prædictam.

prædictam now, but what were conſidered as the bounds of the *civitas* in former times. If the corporation of London have exerciſed this office beyond the walls of the city, the practice has been in derogation of the crown, who otherwiſe would have had a right to appoint a gauger there, as over the reſt of the realm; and thus the privilege muſt have been enjoyed adverſely againſt the grantor of the charter to be explained. What is comprehended by the word *civitas* is a queſtion of fact (*a*).

The oath being proved, which is yearly taken by the Lord Mayor of London in the Exchequer, whereby he ſwears as gauger, to account to the king for all forfeitures of wine, &c. both within the city *and the liberties thereof*; a great number of witneſſes were called, from whom it appeared, that as far back as can be traced, the gauger appointed by the corporation has gauged all wine, oil, ſpirits, &c. imported into London, whether landed at the legal quays within the city, or at ſufferance wharfs beyond it.

In an action at the ſuit of a corporation, what is ſaid by an individual member of it, is not admiſſible evidence for the defendant.

Beſt, Serjeant, in croſs examining one of theſe witneſſes, as to whether the city gauger ever went out of the city to gauge unleſs when ſent for, aſked him what he had heard a certain member of the corporation ſay upon the ſubject, which he contended was good evi-

(*a*) 2 Inſt. 11, 282. Attorney General *v.* Parker. 3 Atk. 576. Blankley *v.* Winſtanley, 3 T. R. 279. Rex *v.* Bellringer, 4 T. R. 810. Withnall *v.* Gartham, 6 T. R. 388.

dence

dence for the defendant as coming from one of the plaintiffs on the record (*a*). But

Lord ELLENBOROUGH obſerved, that in this action at the ſuit of the corporation, what any indifferent individual of it ſaid could not be evidence ;—although he would allow the witneſs to ſpeak as to any thing he might have heard from the city gauger.

Beſt, Serjeant, ſtill contended that the plaintiffs could not be entitled to a verdict in this action, as they had at moſt eſtabliſhed their right to gauge articles *ſold*; whereas in the declaration they claimed the office to gauge *all* wines, &c. within the city of London, or the port and liberties thereof, or coming thereto. Such an office could not be legally created. The crown for the purpoſe of regulating ſales at common law, might appoint an officer to gauge articles to be ſold, but could not empower any one to enter the warehouſe of a ſubject, againſt his conſent, and compel him to pay for gauging articles, which he himſelf meant to conſume. Nor was ſuch authority given by 31 Ed. 3. c. 5.—4 Ric. 2. c. 1. or any of the ſubſequent ſtatutes on this ſubject.—He afterwards argued, that the privilege, whatever it might be, muſt be confined to the limits of the city ; from other offices being expreſsly granted in the charter, to be exerciſed within the port of London, or from Staines Bridge to Yendal in Kent ;—and from the impoſſibility of words ſo

(*a*) Bauerman *v.* Radenius, Ib. 670.—Payne *v.* Rogers, 7 T. R. 653.—Crail *v.* D'Aeth, Doug. 407.

clear

clear as thoſe concerning the office of gauger receiving any extenſion.

Lord ELLENBOROUGH ſaid, that the *excluſion* being admitted, the only queſtion was as to the right of the corporation to exerciſe within the London docks the office of gauger, which, with ſeveral others, had been granted to them by Edward IV. for the ſum of 7001. The office of gauger by the words of the grant, was to be exerciſed *within the city*; which words in their natural ſenſe, muſt mean within the walls of the city; but looking to other parts of the ſame charter in the *inſpeximus* of 14 Charles I. it appeared, that different offices were granted to the corporation, ſome of them to be exerciſed within the city, and others, without any apparent reaſon for the diſtinction, within the city and liberties thereof; and it was poſſible that *civitatem*, as applied to the office of gauger, might be uſed in a laxative ſenſe, ſo as to comprehend, amongſt other places without the walls, the ſite of the London docks.—Then, was there evidence to ſupport this conſtruction?—The oath of office muſt be preſumed to have continued the ſame ſince the time of Edward IV. and muſt therefore be taken as a cotemporaneous expoſition of the grant by the crown itſelf.—The uſage likewiſe as far back as could be traced, ſhewed, that the word *city* had received, as it was ſuſceptible of, a larger interpretation than within the limits of the walls. If it comprehended the liberties, the bounds of theſe not being proved, they muſt be taken to extend to ſuch places where the right had been exerciſed —

It is part of the ancient prerogative of the crown, as incident to the duty of

As to the creation of the office, he conceived, there was

was nothing to reſtrict the crown to the appointment of a gauger to gauge articles *for ſale*. The duties of cuſtoms were inherent in the crown from the earlieſt periods; and if the crown had this right, it muſt have had the means of enjoying it; which could only be, by aſcertaining the quantities of articles imported, whether for ſale or otherwiſe. The corporation of London, therefore, might repreſent the crown in the exerciſe of its functions with regard to this office, as it did in various others, concerning which no doubt had ever been entertained.—

cuſtoms, to appoint officers to gauge all guageable articles imported into the kingdom, whether for ſale or otherwiſe.

The plaintiffs had a verdict on the 3d and 4th counts, with nominal damages.

The *Attorney General*, *Garrow*, the *Common Serjeant*, *Dampier*, and *Watſon*, for the plaintiffs.

Beſt Serjeant, *Holroyd*, *Boſanquet*, and *Harriſon*, for the defendant.

[Attornies, *Newman* and *Weſtons*.]

(*a*) *Vide* Com. Dig. tit. "Prerogative," (D. 43, &c.) tit. "London," (K. 1, &c.) Bac. Abr. tit. "Offices and Officers"

COLSELL AND OTHERS EXECUTORS, &c. *v.* BUDD AND OTHERS EXECUTORS, &c.

Monday, Dec. 7.

DEBT on bond.—Pleas *non eſt factum teſtatoris*, and payment at and after the day by the executors.

To raiſe the preſumption that a bond has been ſatisfied, there muſt be a lapſe of the full period of 20 years from its becoming forfeited; unleſs there be ſome additional circumſtance, as an intermediate ſettlement of accounts between the parties.

The bond was dated 23d January 1779, and was conditioned for the payment of 1000*l.* to the plaintiffs' teſtator within three months, after the death of one Mary Colſell, who died in December 1787. The defendants' teſtator was then dead. The plaintiffs' teſtator lived three years after. No demand of payment had been made till the commencement of the preſent action.

Dampier, for the defendants, contended, that although the money not being payable till March 1788, twenty years had not ſince elapſed, ſtill payment was to be preſumed, as it was now ſo very near that period, and it muſt be ſuppoſed, that if the bond had not been diſcharged, the plaintiffs, as executors, would long ſince have put it in ſuit. He relied upon *Oſwald* v. *Leigh* (*a*), where Lord Mansfield is ſtated to have ſaid, "That there was a diſtinction between length "of time as a bar, and where it was only evidence of "it; the former was poſitive, the latter only preſump-"tion; and he believed, that in the caſe of a bond "no poſitive time had been expreſsly laid down by "the court, *that it might be* 18 *or* 19 *years*."—Dampier further undertook to ſhew, that in May 1788, a ſettlement of accounts had taken place between the defendants and the plaintiffs' teſtator, when the latter received from them a ſum of money ſufficient to cover the preſent demand, which muſt be taken to have been at that time ſatisfied.

(*a*) 1 T. R. 272.

A witneſs

A witneſs was then called, who ſpoke to the parties having met at the period above mentioned, and having paid a large ſum of money to a third perſon; but it did not appear that there had been any ſettlement of accounts as between themſelves.

Lord ELLENBOROUGH.—After a lapſe of 20 years, a bond will be preſumed to be ſatisfied; but there muſt either be a lapſe of 20 years, or a leſs time, coupled with ſome circumſtance to ſtrengthen the preſumption. Here, if it had been proved, that the parties had accounted together, after the money became payable, it might have been inferred that it was included in the ſettlement; but as there is no evidence of this, and as 20 years have not elapſed ſince the bond was forfeited, it cannot be conſidered as diſcharged.

Verdict for the plaintiffs.

The *Attorney General* and *Wigley* for the plaintiffs.

Dampier for the defendants.

[Attornies, *Wingfield* and *Allen*.]

Vide Forbes *v.* Wale, 1 Blac. Rep. 532.—Searle *v.* Lord Barrington, 2 Stra. 826, and Waſhington *v.* Brymer, Peak. Law Ev. App. XXXIV.

SMITH

Monday, Dec. 7. SMITH AND OTHERS ASSIGNEES OF PARQET, A BANKRUPT, *v.* BEADNELL.

If a witneſs anſwers queſtions to which he might have demurred as ſubjecting him to penalties, his anſwers may be uſed againſt him to all legal purpoſes; and therefore, in an action on 5 G. 2. c. 30. § 21. the defendant's examination before the commiſſioners may be given in evidence, to ſhew that by his own confeſſion he had concealed property of the bankrupt.

DEBT on 5 Geo. 2. c. 30. § 21 (*a*), to recover a penalty of 100*l.* together with 2,450*l.* being double the ſum of 1,225*l.* which had belonged to the bankrupt, and had been concealed by the defendant. The declaration likewiſe contained a count for money had and received.—Plea, *nil debet.*

The trading of the bankrupt, the act of bankruptcy, the petitioning creditor's debt, the commiſſion, and the aſſignment being proved, the counſel for the plaintiffs propoſed to adduce the defendant's examination before the commiſſioners, as evidence of his having

(*a*) Which enacts, that "all and every perſon and perſons, who ſhall have accepted of any truſt or truſts, and ſhall wilfully conceal or protect any eſtate, real or perſonal, of any perſon or perſons becoming bankrupt from his, her, or their creditors, and ſhall not within 42 days next after ſuch commiſſion ſhall iſſue forth, and notice thereof be given in the London Gazette, diſcover and diſcloſe ſuch truſt and eſtate in writing, to one or more of the commiſſioners or aſſignees of ſuch bankrupt or bankrupt's eſtate, and likewiſe ſubmit him or herſelf to be examined by the commiſſioners, in and by the ſaid commiſſion authorized, or the major part of them, if thereunto required, and truly diſcover the ſame, ſhall forfeit the ſum of 100*l.* of lawful money of Great Britain, and double the value of the eſtate, either real or perſonal, ſo concealed, to and for the uſe and benefit of the ſaid creditors, to be recovered by action of debt in any of his Majeſty's courts of record at Weſtminſter, in the name of the aſſignee or aſſignees of the ſaid commiſſioners."

concealed

concealed the property. It appeared that he had been examined by counſel on the part of the aſſignees, and though unaided by counſel himſelf, he had not been cautioned by the commiſſioners, or informed of the uſe to which his anſwers might be applied; but that he took no exception to any of the queſtions put to him.

The *Attorney General* now objected to the admiſſibility of the defendant's examination as evidence againſt him in this action. He allowed that what a man ſaid in the courſe of a legal examination, might generally be given in evidence againſt him; but here the defendant was ſued for heavy penalties, and he was not to be ſubjected to theſe by his own confeſſion of facts, which could not have been extorted from him. The commiſſioners could not have compelled him to anſwer any queſtions which might ſubject him to a penalty; and his anſwers to ſuch queſtions could not be applied to this purpoſe. His evidence before the commiſſioners was given *diverſo intuitu*, and could only be uſed to enable the aſſignees to recover the effects of the bankrupt.

Garrow for the plaintiffs obſerved, that this would materially curtail the juriſdiction of the commiſſioners. The ſtatutes properly empowered them to ſummon before them, and to examine any perſon ſuſpected of ſecreting the effects of the bankrupt; but ſuch a perſon, though able to communicate the moſt important information might now demur to every queſtion put to him, and ſay "42 days have elapſed ſince the iſſuing of the commiſſion; if I diſcloſe having any property

property of the bankrupt in my cuſtody, I ſubject myſelf to an action for double the value, and 100*l.* beſides; I therefore refuſe to anſwer one of your queſtions." The act of parliament would be thus virtually repealed. Beſides, a ſtatute paſſed upon occaſion of the late impeachment, declared in purſuance of the opinion of a majority of the Judges, that no one could refuſe to anſwer queſtions, which might ſubject him to civil diſabilities.—But even ſuppoſing that he might have excepted to the queſtions; ſince he thought fit to anſwer them, his examination is receiveable as evidence againſt him.

The *Attorney General* in reply urged, that this ſtatute contained an expreſs exception as to pecuniary penalties (*a*). He repreſented the hard ſituation in which perſons ſummoned before the commiſ-

(*a*) 46 Geo. 3. c. 37.—— "Whereas doubts have ariſen "whether a witneſs can by "law refuſe to anſwer a "queſtion relevant to the mat-"ter in iſſue, the anſwering "of which has no tendency "to accuſe himſelf, or to ex-"poſe him to any penalty or "forfeiture, but the anſwering "of which may eſtabliſh or tend "to eſtabliſh that he owes a "debt, or is otherwiſe ſubject to "a civil ſuit, at the inſtance of "his majeſty, or of ſome other "perſon or perſons;" be it therefore declared and enacted, &c. that a witneſs cannot by law refuſe to anſwer a queſtion relevant to the matter in iſſue, the anſwering of which has no tendency to accuſe himſelf, or to expoſe him to penalty or forfeiture, of any nature whatſoever, by reaſon only, or on the ſole ground, that the anſwering of ſuch queſtion may eſtabliſh, or tend to eſtabliſh, that he owes a debt, or is otherwiſe ſubject to a civil ſuit, either at the inſtance of his majeſty, or of any other perſon or perſons.

ſioners

ſioners would be placed—being obliged to attend—neceſſarily ignorant of the exiſtence of ſuch a law, as this was the firſt inſtance of a proſecution upon it—and likely to render themſelves liable to a penalty of ſeveral thouſand pounds by anſwering queſtions, to which they might have objected. The commiſſioners were not veſted with any inquiſitorial power to extort a confeſſion from criminals, and the examinations were only intended, and were only to be uſed, for the benefit of the bankrupt eſtate.

Lord ELLENBOROUGH.—Every one muſt be ſuppoſed to be cognizant of a public law. A perſon examined before the commiſſioners of bankrupt is like any other witneſs called to give evidence by virtue of a *ſubpœna*. He ſpeaks at the peril of his examination being turned againſt himſelf. He may demur, to be ſure, to all queſtions which would ſubject him to penalties.—Here the defendant might have demurred, and his objections could only have been removed by the aſſignees (to whom the action is given) delivering him a releaſe. Thus he might have protected himſelf: but having unguardedly anſwered the queſtions put to him, his anſwers may be employed againſt him for all purpoſes to which they are legally applicable.

The examination was then read; in which the defendant acknowledged that, beſides paying *Parquet* 200*l.* after an act of bankruptcy, he had retained in his hands the ſum of 1225*l.* which had been depoſited with him, to be ſent to the bankrupt's

mother, reſiding at Liſle in Flanders.—It appeared, however, that before the commencement of the action, this ſum of money had been recovered by the aſſignees, and it was admitted that the defendant had not acted with any fraudulent intention.

Therefore, this being, under the circumſtances, rather a hard action, it was agreed between the parties, on the recommendation of the court, that the plaintiffs ſhould take a verdict for the 200 *l.* as money had and received to their uſe, for the 100 *l.* penalty, and for the double of a nominal ſum.

Garrow and *Holroyd* for the plaintiffs.

The *Attorney General* and *Dampier* for the defendant.

[Attornies, *Palmer & Co.* and *Pitches.*]

Vide Title *v.* Grevett, 2 Lord Raym. 1008.—Hawkins *v.* Perkins, 1 Stra. 406.—Bain *v.* Hargrave, Peak. Law Ev. 184.—Raynes *v.* Towgood, ibid. 185. Raynes *v.* Spicer, 7 T. R. 178.—Bauerman *v.* Radenius, ib. 663.—Wiſtlake *v.* Collard, Peak. Cas. 5.—Warwickſhall's Caſe, Leach Cro. Law, 298.

ADJOURNED SITTINGS IN LONDON.

WHATLEY AND OTHERS v. TRICKER AND OTHERS.

Tuesday, Dec. 8.

ASSUMPSIT againſt the defendants as acceptors of a bill of exchange for 201 *l.* 11 *s.* 9 *d.* drawn by one Roſs, payable to his own order, and indorſed by him to the plaintiffs.—A *prima facie* caſe being made out in their favour,—

The holder of a bill of exchange may diſcharge the liability of the acceptor by parol; but for this purpoſe, the words muſt amount to an abſolute renunciation of all claim upon him in reſpect of the bill.

The defence ſet up was, that they had waived their remedy againſt the defendants as acceptors of the bill. In ſupport of this, it was proved that as the plaintiffs knew the defendants had received no conſideration for the bill, and as they had in their hands a large quantity of goods, the property of the drawer, from the produce of which they expected to be ſatisfied for this as well as ſeveral other demands upon him, they had ſaid at a meeting of the defendants' creditors, "they looked to the "drawer and ſhould not come upon the acceptors of "the bill;" in conſequence of which, the defendants aſſigned the whole of their property for the benefit of their other creditors, and paid them 15 *s.* in the pound.—However the goods of the drawer in the plaintiffs' hands had turned out to be of little value, and he had ſince become inſolvent.

Same day.

FARNSWORTH *v.* GARRARD.

Where the plaintiff declares on a *quantum meruit* for work and labour done and materials found, the defendant may reduce the damages by shewing that the work was improperly done; and may entitle himself to a verdict by shewing that it was wholly inadequate to answer the purpose for which it was undertaken to be performed.

ASSUMPSIT for work and labour done and materials found; with the common counts. Plea, *non assumpsit*, with a notice of set-off.

The defendant had rebuilt the front of a house for the plaintiff; but when finished, it was considerably out of the perpendicular, and, according to several of the witnesses, in great danger of tumbling down, though others said it might stand for many years.

Park contended that the plaintiff was still entitled to recover the whole of his demand; and that if the building was so ill executed as was represented, the defendant's remedy was a cross action. He relied upon Duffit *v.* James, Cormach *v.* Gillis, Morgan *v.* Richardson (*a*), and particularly Templer *v.* M'Lachlan (*b*), in which the court of Common Pleas had recently decided, that negligence cannot be set up as a defence to an action on an attorney's bill. At any rate the plaintiff must have a verdict with some damages; as it was impossible that the defendant should be allowed to keep the *bricks* without paying for them.

Lord ELLENBOROUGH.—This action is founded on a claim for meritorious service. The plaintiff

(*a*) Cited 7 East. 480, 1, 2. (*b*) 2 New Rep. 136.

is

is to recover *what he deſerves.* It is therefore to be conſidered how much he deſerves, or if he deſerves any thing. If the defendant has derived no benefit from his ſervices, he deſerves nothing, and there muſt be a verdict againſt him.—There was formerly conſiderable doubt upon this point. The late Mr. Juſtice Buller thought, (and I, in deference to ſo great an authority, have at times ruled the ſame way) that in caſes of this kind, a croſs action for the negligence was neceſſary, but that if the work be done, the plaintiff muſt recover for it. I have ſince had a conference with the judges on the ſubject; and I now conſider this as the correct rule,—that if there has been no beneficial ſervice, there ſhall be no pay; but if ſome benefit has been derived, though not to the extent expected, this ſhall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence. The claim ſhall be co-extenſive with the benefit.—Here then has there been any benefit, and to what amount? If the wall will not ſtand and muſt be taken down, the defendant has derived no benefit from the plaintiff's ſervice, but has ſuffered an injury. In that caſe he might have given him nctice to remove the materials. Retaining them, he is not likely to be in a better ſituation than if the plaintiff had never placed them there; but if it will now coſt him leſs to rebuild the wall, than it would have done without theſe materials, he has ſome benefit and muſt pay ſome damages.

Verdict for the defendant.

Park and *Roberts* for the plaintiff.

Garrow and *Lawes* for the defendant.

[Attornies, *Rooke* and *Wegener*.]

Vide Dickſon v. Clifton, 2 Wils. 319.—Baſten v. Butter, 7 Eaſt. 479. – Broom v. Davis, and King v. Boſton, there cited, and Mills v. Baimbridge, cited in Templer v. M'Lachlan, 2 New Rep. 137.

3. Camp. 38. *N. B.* I have ſeen an accurate note of Morgan v. Richardſon; from which it appears that it is not an authority for the purpoſe for which it was cited here or in Baſten v. Butter. The action was againſt the acceptor of a bill of exchange at the ſuit of the drawer, the bill being payable to his own order.—Defence, that the bill had been accepted for the price of ſome hams bought by the defendant from the plaintiff, to be ſent to the Eaſt Indies; and that the hams had turned out ſo very bad that they were almoſt quite unmarketable. The ſum for which they actually ſold was paid into court.—Lord Ellenborough held that though where the conſideration of a bill of exchange fails entirely, this will be a ſufficient defence to an action upon it, by the original party, it is no defence to ſuch action, that the conſideration fails partially; but that under ſuch circumſtances the giver of the bill muſt take his remedy by an action againſt the perſon to whom it was given.

Fleming v. Simpſon.—*K. B. Sittings after M. T.* 1806.—Action by the indorſee of a bill of exchange againſt the acceptor. This bill was drawn by Fleming, Goodall, and Co. and accepted by the defendant, for the amount of a pipe of "beſt London particular Madeira," which he had ordered of them. The defence ſet up was that the wine was a very bad quality when delivered in London, and could not have been *beſt London particular Madeira* when ſhipped, and that the indorſee was a partner in the houſe of the ſhippers.

Lord

Lord ELLENBOROUGH.—By delivery on board the ſhip the wine became the property of the defendant, and he muſt bear all riſks and bring his action againſt the captain if the wine be ſpoiled in its paſſage. To ſuſtain this defence, it muſt be ſhewn not only that the plaintiff is a partner in the houſe of Fleming, Goodall, and Co. who drew the bill, but that there was a fraud on their part in the firſt inſtance in ſhipping a commodity of a different and very inferior quality to that ordered. If it was a clear fraud in the ſhippers, and the plaintiff was a partner in their houſe, he could not recover on this bill; but this defence is not ſufficient if the commodity ſhipped only be of rather an inferior quality to that ordered.

JANSON *v.* BROWN.

Same day.

TRESPASS for ſhooting the plaintiff's dog. Pleas, 1. *not guilty*; and 2. a juſtification, that the dog was worrying and attempting to kill a fowl of the defendant's, and could not otherwiſe be prevented from ſo doing (*a*). Replication to the laſt plea, *de injuriâ ſuâ propriâ abſque tali cauſâ.*

If defendant juſtifies ſhooting a dog, becauſe the dog was worrying his fowl, and could not otherwiſe be prevented, he muſt prove that the dog was in the act of worrying the fowl at the very moment he ſhot him.

The

(*a*) Wright *v.* Ramſcot, 1 Saund. 84, is a ſtrong authority that ſuch an averment is neceſſary in a plea of this kind; although in Keck *v.* Halſtead, 2 Lutw. 1494, a juſtification omitting it was held to be good. It ſeems, that if the tranſaction had taken place in the defendant's *poultry-yard*, it would have been enough to have ſtated in the plea, that the dog *was purſuing* the fowl; as it is not neceſſary to allege that the defendant could not otherwiſe prevent the dog from killing conies in

The caſe being made out on the part of the plaintiff, *Garrow* for the defendant ſaid, he ſhould prove that juſt before the dog was ſhot, being accuſtomed to chaſe the defendant's poultry, he was worrying the fowl in queſtion, and that he had not dropped it from his mouth above an inſtant when the piece was fired. But,

Lord ELLENBOROUGH ſaid, this would not make out the juſtification; to which it was neceſſary that when the dog was ſhot, he ſhould have been in the very act of killing the fowl, and could not be prevented from effecting his purpoſe by any other means.

Verdict for plaintiff, with 1*s.* damages.

Park and *Richardſon* for the plaintiff.

Garrow and *Manley* for the defendant.

[Attornies, *Swans* and *Brooks.*]

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in a warren; but it is ſufficient to ſtate, that the dog was in the warren purſuing the conies there, and therefore he killed him. Wadhurſt *v.* Damme, Cro. Jac. 44. And it is the ſame, if a dog runs after deer in a park. Barrington *v.* Summers, 3 Lev. 28. 1 Sid. 336. Com. Dig. tit. Pleader. (3 M. 33.)

COURTEEN *v.* TOUSE.

Wednesday, Dec. 9.

ACTION on a policy of insurance on goods on board the Mary, from London to Leghorn.

A leading question may be put, when it is necessary to contradict a witness on the other side, as to the contents of a paper, which has been destroyed.

The ship, the plaintiff himself being on board, put into Ferrol, through stress of weather, during the late peace; where, according to his case, she was seized and condemned with her whole cargo, for a supposed breach of the Spanish revenue laws. The defence was, that the plaintiff himself had written a letter from Ferrol to his son in London, saying, that he had disposed of all his goods, at a profit of 30 *per cent.*

The son being called to prove the execution of the policy (*a*), was cross-examined as to the contents of

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(*a*) The policy was signed by one Butler for the defendant. A witness called before proved Butler's hand-writing, and swore that he had often observed him sign policies for the defendant; but he had not seen any general power of attorney from the defendant to Butler; nor did he know that the defendant had given Butler authority to sign this specific policy; nor was he acquainted with any instance in which the defendant had paid a loss upon a policy so subscribed. Lord Ellenborough held that the proof of agency must be carried farther. Neale *v.* Erving. 1 Esp. Cas. 61.

If it is established, that an agent had authority to sign a policy for an underwriter, it follows, that he had authority to adjust it. *Richardson v. Anderson. Sittings after M. T.* 1805. Action on a policy of insurance. Loss by capture. The subscription of the policy by defendant's agent was admitted, and a witness proved the signature of the same agent to an adjustment on the policy as for a total loss.—Lord Ellenborough. If an agent has authority to subscribe a policy, he may also adjust it; and here as you have admitted the agent's subscription to the policy, and that he was authorised to subscribe it, you are bound to admit that he had authority to sign the adjustment.

the

the letter. He ſwore that it was loſt, but that it contained no intimation of the kind ſuppoſed, and only ſaid upon that ſubject, that the plaintiff might have diſpoſed of his goods at a great profit, as he had been offered 8*s*. for a pair of cotton ſtockings he then wore, by a cuſtom-houſe officer.

To contradict this teſtimony, ſeveral witneſſes were produced, to whom the letter had been read, when received in London. One of theſe having ſtated all that he recollected of it, was aſked, "if it contained any thing about the plaintiff having been offered 8*s*. for a pair of cotton ſtockings, by a cuſtom-houſe officer." This being objected to as a leading queſtion,

. . . . . .

Lord ELLENBOROUGH ruled, that after exhauſting the witneſs's memory as to the contents of the letter, he might be aſked, if it contained a particular paſſage recited to him, which had been ſworn to on the other ſide; otherwiſe, it would be impoſſible ever to come to a direct contradiction.

It afterwards appeared from the evidence of the captain, that the whole of the cargo had been ſeized as forfeited, and the plaintiff had a verdict.

Park and *Curwood* for the plaintiff.

Garrow and *Topping* for the defendant.

[Attornies, *Courteen* and *Crowder & Co.*]

Vide Peak. Law Ev. 187, 8.

WALLACE *v.* HARDACRE.

Same day.

ASSUMPSIT againſt the defendant as acceptor of a bill of exchange, dated 23d March, 1807, for 319*l.* 10*s.* drawn by Edward Maine, at two months, payable to his own order, and indorſed by him to the plaintiff.

If A. the indorſee for value of a bill of exchange, to which B. the indorſer had forged the acceptance of C., delivers it up to B, on his ſolicitation, and receives from him, in lieu thereof, a bill, accepted by D. without conſideration; A. may maintain an action on this bill againſt D., unleſs there was an agreement between him and B. to ſtifle a proſecution for forgery.

Proof being given of the defendants hand-writing to the bill; that Maine had indorſed it by procuration; and that at the time of the indorſement, Maine was largely indebted to the Plaintiff,—

There were two defences ſet up to the action. *Firſt*, that the plaintiff was not a *bonâ fide* holder of the bill. In ſupport of this, the facts were, that Maine had forged the acceptance of a Mr. Addiſon, his uncle, to ſeveral bills, and paid them to Wallace, the plaintiff; but before they became due, he applied to the plaintiff, requeſting him not to preſent them for payment, or he ſhould be ruined, and offering him a bill accepted by the preſent defendant, in lieu of them. The forged bills were accordingly delivered up, and the bill the ſubject of this action, was ſent to the plaintiff. It was then unindorſed; but Maine, by a letter dated 23d April, 1807, authorized one Murphy to indorſe it, who did ſo accordingly. The acceptor had received no value for it.

Park for the defendant therefore contended, that the conſideration for the bill, as between Maine and the plaintiff, was corrupt and illegal. Even ſuppoſing that the plaintiff did not mean to compound felony,

ſtill he had not given that *bonâ fide* conſideration which could enable him to maintain an action as indorſee of an accommodation bill. Being aware of the forgery, it was his duty not to have parted with the means of bringing the delinquent to juſtice; and he could not be conſidered as an innocent holder of a bill which he had thus obtained.

Lord ELLENBOROUGH however held, that to bar the right of the indorſee, it was neceſſary to ſhew that the bill had been indorſed as a conſideration for compounding a proſecution for forgery, to which the indorſer was liable. It was common enough, upon diſcovering that bank-notes or bills of exchange had been forged, to ſend them back to the perſons from whom they had been received, and to get others that were valid in their ſtead. But it would be too much to ſay, that the conſideration for theſe laſt was corrupt and illegal, and that they could not be rendered available in the hands of thoſe whoſe object in getting poſſeſſion of them was merely to exchange ſecurities that were forged for others without this vice. If any bargaining could be ſhewn here to ſtifle a proſecution for a criminal act, the action certainly could not be maintained; but otherwiſe, the mere ſubſtitution would not invalidate the plaintiff's right to recover againſt the acceptor of this bill (*a*).

As an accommodation bill does not paſs under a commiſſion of bankrupt againſt the payee, he may indorſe it, after an act of bankruptcy, and his

The *ſecond* ground was, that Maine had committed an act of bankruptcy before the bill was delivered to the plaintiff, and that no intereſt therefore could be

(*a*) Cuthbert v. Haley, 8 T. R. 390. Parr. v. Eliaſon, 3 Eſp. Caſ. 210. Witham v. Lee, 4 Eſp. Caſ. 264.

conveyed

conveyed by his indorſement. It was allowed, that according to the caſe of Lempriere *v.* Paſley, 2 T. R. 485, if the bill had been depoſited with the plaintiff by Maine while ſolvent, he might have put his name upon it as indorſer, after committing an act of bankruptcy (*a*); but it was inſiſted, that the indorſement was a mere nullity, as he had become bankrupt before parting with the poſſeſſion of it.

indorſee for a valuable conſideration, may recover upon it againſt the acceptor.

Lord ELLENBOROUGH.—The bill could not paſs under the commiſſion, being of no value in the hands of the bankrupt. There having been no conſideration between him and the acceptor, he could not have ſued upon it himſelf, and no right of action in reſpect of it could veſt in his aſſignees. But the bill muſt be available in the hands of the plaintiff, who has given a valuable conſideration for it; and the acceptor is here, as in other caſes of accommodation bills, barred of that defence which he might have ſet up to an action at the ſuit of one of the original parties to it (*b*).

The defendant's counſel then maintained, that the bankrupt had a valuable property in the bill, and that it therefore paſſed under the commiſſion as part of his effects; for this reaſon, that the defendant had received a croſs acceptance of Maine's as a conſideration for accepting this bill; and that though that acceptance had produced nothing, it prevented the bill from being an accommodation bill, and gave the defendant a ſet off againſt the aſſignees of the bankrupt (*c*).

But the *Attorney General*, on the other ſide, proteſted ſtrongly againſt this mode of *blowing hot and*

(*a*) Smith *v.* Pickering, Peak. Caſ. 50.
(*b*) Arden *v.* Watkins, 3 Eaſt. 317.
(*c*) Rolfe *v.* Caſton, 2 H. Bl. 570 —Cowley *v.* Dunlop, 7 T. R. 565.—Buckler *v.* Butivant, 3 Eaſt. 72.—Kent *v.* Lowen, *poſt*.

cold, and the croſs acceptance not being properly made out, the plaintiff had a verdict.

The *Attorney General* and *Warren* for the plaintiff.

Park and *Marryat* for the defendant.

[Attornies, *Wadeſon* & Co. and *Wood.*]

Same day.

THOMPSON *v.* BERNARD.

If words *primâ facie* imputing felony, have been uſed in a different ſenſe, they are not actionable.

CASE for ſlander. It appeared that the defendant had uſed the following words, which were laid in the declaration, "Thompſon is a damned thief; and ſo was his father before him; and I can prove it;" but that he added, "Thompſon received the earnings of the ſhip, and ought to pay the wages." The witneſs to whom theſe words were addreſſed, had been maſter of a ſhip belonging to a perſon deceaſed, who had left the defendant his executor; and at the time was applying to him for payment of his wages.

Lord ELLENBOROUGH directed a nonſuit; obſerving, that the word "thief" was uſed without any intention in the defendant to impute felony to the plaintiff; which muſt appear to ſupport the declaration.

Vide Minors *v.* Leeford, Cro. Jac. 114. — Criſtie *v.* Cowell, Peak. Caſ. 4.—Lord Cromwell *v.* Denny, 4 Co. 13-14.—Bul. N. P. 5.

When actionable words laid in the declaration are proved, other words actionable in themſelves may be given in evidence, to ſhew *quo animo* the former were ſpoken.

Ruſſell

Ruſſell v. Marquiſter, Middx. Sittings after H. T. 1807.—In an action for ſlander, *Garrow* for plaintiff having proved the words in the declaration, offered evidence of other actionable words ſpoken by defendant afterwards.—*Gibbs* objected to this evidence on the ground, that if ſuch words were taken into conſideration by the Jury, defendant would be made to pay a double compenſation in damages for one and the ſame injury, viz. 1ſt, in the preſent action, and 2dly, in another action that might be brought for thoſe words; and he ſaid he had always underſtood the diſtinction to be between words which were actionable and thoſe which were not; the last firſt might be given in evidence, though not mentioned in the declaration; but not the laſt.— first Per Lord ELLENBOROUGH.— Although there has formerly been ſuch a diſtinction, it is not founded upon any principle. You cannot give in evidence ſpecial damage not laid in the declaration; but you may give in evidence any words as well as any act of defendant to ſhew *quo animo* he ſpoke the words which are the ſubject of the action: Still it would be the duty of the Judge to tell the Jury, that they muſt give damages only for the words which are the ſubject of the action.

In Mead *v.* Daubigny, Peak. Caſ. 125. Lord KENYON refuſed to admit evidence of words actionable in themſelves not mentioned in the declaration, to ſhew the malice of the defendant; but afterwards in an action for a libel, his Lordſhip for the ſame purpoſe, allowed other papers to be given in evidence, which were themſelves libels on the plaintiff.—Lee *v.* Huſon, Peak. Caſ. 166.—*Vide* alſo—Rex *v.* Pearce, Peak. Caſ. 75.

See Finnerty v Tipper 2. Campb. 72.

Same day.

De Havilland, surviving executor of Bezoil, v. Bowerbank.

2 Camph. 426.

In an action for money had and received, the plaintiff is not entitled to intereſt, even from the time of making a demand of the principal; unleſs, 1ſt, he give in evidence an expreſs promiſe to pay intereſt; or 2dly, ſhew ſomething from which ſuch a promiſe may be inferred; or, 3dly, prove that the money has been uſed by the defendant, and intereſt has been made of it. And *comme ſemble*, the only other inſtance in which intereſt is recoverable, is upon a contract for the payment of money on a certain day, as on bills of exchange, promiſſory notes, &c.

ASSUMPSIT for money had and received by the defendant to the uſe of the plaintiff and the deceaſed executor; with a count laying the promiſe to the plaintiff only. Plea, *non aſſumpſit.*

The facts as admitted were ſhortly theſe:—Under a commiſſion of bankruptcy againſt a creditor of Bezoil, his executors in the year 1784, proved a debt of 904*l.* 4*s.* 1*d.* Upon this ſum the defendant, as their agent, received five dividends. Of theſe he had paid over two; but the other three, which he had received in the years 1797-8-9, he ſtill retained in his hands, making together the principal ſum of 339*l.* 1*s.* 4*d.*—The only queſtion between the parties was, whether the defendant ſhould pay intereſt on this, either from the reſpective times of receiving the money, or from a demand of payment, which had been made about two years ago?—There was no proof of any expreſs promiſe to pay intereſt, or that any uſe had been made of the principal by the defendant; nor did it appear, that intereſt had been at any paid on this or any former balance between the parties.

Lord Ellenborough.—I want very much to lay down a certain rule reſpecting the payment of intereſt. I re-

I recollect ſome extremely capricious determinations on this ſubject; and on all occaſions, as little as poſſible ſhould be left in the diſcretion of a Judge. It appears to me, that intereſt ought to be allowed only in caſes where there is a contract for the payment of money on a certain day, as on bills of exchange, promiſſory notes, &c.; or where there has been an expreſs promiſe to pay intereſt; or where, from the courſe of dealing between the parties, it may be inferred that this was their intention; or where it can be proved that the money has been uſed, and intereſt has been actually made. Without ſome reſtrictions of this kind, book debts might be allowed to bear intereſt; and in every action for work and labour, or for goods ſold, there muſt be a calculation of what is due for intereſt above the principal debt. Mr. Juſtice Buller in one inſtance, allowed intereſt on policies of inſurance; but I believe, that he was there thought to have done wrong.—My great object is, to have a fixed rule, and to exclude diſcretion.

The *Attorney General* hinted, that under a count for money had and received, the plaintiff had a right to recover to the amount to which he was damnified by the money being withheld from him. This would include intereſt; and the damages were to be ſhaped, not by what the defendant had gained, but what the plaintiff had ſuffered. On a promiſſory note intereſt was payable without any demand; but here an expreſs demand had been made above two years ago.

Lord ELLENBOROUGH ſaid, that the rule propoſed, of conſidering how far the plaintiff was damnified was ſo wide, that it would let in intereſt in almoſt every caſe, and it afforded no aſſiſtance in drawing a line between caſes where intereſt ſhould be allowed, and where it ſhould be refuſed. If the party loſt the uſe of his money, it was his own fault in not ſuing for it. He thought, that where money of the plaintiff had come to the hands of the defendant, to eſtabliſh a right to intereſt upon it, there ſhould either be a ſpecific agreement to that effect, or ſomething ſhould appear from which a promiſe to pay intereſt might be inferred, or proof ſhould be given of the money being uſed. This he conſidered a ſafe rule, and he ſhould go by it; although he had ſeen a ſuggeſtion to the contrary elſewhere. There was nothing to take this caſe out of the rule; and the plaintiff was therefore only entitled to his principal.

Verdict for the plaintiff, damages 339*l.* 1*s.* 4*d.*

The *Attorney General* and ——— for the plaintiff.

Park for the defendant.

[Attornies, *Barrow* and *Willis*.]

In Nichol *v.* Thompſon, which was money had and received, to recover the balance of an account, and which was tried the ſame morning; Lord ELLENBOROUGH refuſed to allow the plaintiff intereſt, till, on inſpecting the account, it appeared that intereſt had been allowed on former balances, which evidenced the mode of dealing between them. *Vide* Blancy *v.* Hendrick, 3 Wilſ. 205. 2 Black Rep, 761. S. C.—Robinſon *v.* Bland, 2 Burr. 1085. *Anonymous*, 6 Mod. 138. - Beawes L. M. 461.—Orr *v.* Churchill, 1 H. Bl. 227.—Trelawney *v.* Thomas, Ib. 303. —Walker

—Walker *v.* Conſtable. 1 B. and P. 306.—Moſes *v.* Macferlan, 2 Burr, 1005.—Tapenden *v.* Randall, 2 B. and P. 472.—Frith *v.* Leroux, 2 T. R. 57.—Entwiſtle *v.* Shepherd, Ib. 78.—Herries *v.* Jamieſon, 5 T. R. 553.—Mountford *v.* Willes, 2 B. and P. 337.—Lee *v.* Lingard, 1 Eaſt. 401.—Dixon *v.* Parkes, 1 Eſp. Caſ. 110.—Blake *v.* Lawrence, 4 Eſp. Caſ. 147. It would fortunately be a very difficult matter to fix upon another point of Engliſh law, on which the authorities are ſo little in harmony with each other.

CHAMPION *v.* SHORT.

Same day.

ASSUMPSIT for goods ſold and delivered. Plea, tender as to 11*l.* 9*s.* and *non aſſumpſit* as to the reſidue.

The defendant reſides at Saliſbury, and on the 7th May 1806, gave an order to the rider of the plaintiff, a wholeſale grocer in London, "for half a cheſt of French plums, two hogſheads of raw ſugar, and 100 lumps of white ſugar; to be all ſent down without delay." The plums and the raw ſugar arrived nearly as ſoon as the courſe of conveyance would permit; but the white ſugar not coming to hand, the defendant countermanded it, and gave notice to the plaintiff, that as he had wiſhed to have the two ſorts of ſugar together, or not at all, he would not accept of the raw. The plums he uſed, and the ſum tendered was ſufficient to

If a perſon orders ſeveral articles from a tradeſman, at the ſame time, though at diſtinct prices, he may conſider the whole as forming one order, and he will not be obliged to accept or pay for any particular article, unleſs all the reſt are furniſhed according to the terms agreed on; but if he accept of any one article, he is precluded from ſaying that individually ſurniſhed according to the contract.

the order was entire, and he will be obliged to accept and pay for ſo many as are

cover their value. The plaintiff not going for the price of the lumps, the only queſtion was, as to the defendant's liability, under the circumſtances, to pay for the two hogſheads of raw ſugar.

On the one hand it was urged, that the order given was one entire contract, on the entire performance of which the defendant relied, and that it was not competent for the plaintiff to execute only ſuch parts of it as were convenient or advantageous to himſelf;—while it was contended on the other, that where there were a great many different articles ordered at ſeparate and diſtinct prices, they could not be conſidered as conſtituting one order or one contract, and that, at any rate, the defendant was here prevented from availing himſelf of this defence, by uſing and tendering to pay for the plums

Lord ELLENBOROUGH.—Where ſeveral articles are ordered at the ſame time, it does not follow, although there be a ſeparate price fixed for each, that they do not form one groſs contract. I may wiſh to have articles A. B. C. and D., all of different ſorts and of different values; but without having every one of them as I direct, the reſt may be uſeleſs to me. I therefore bargain for them jointly. Here, had the defendant given notice that he would accept neither the plums nor the raw ſugar, as without the white ſugar they did not form a proper aſſortment of goods for his ſhop, he might not have been liable in the preſent action; but he has completely rebutted the preſumption of a joint contract including all the articles ordered, by accepting the plums, and tendering payment for them. Therefore, if the raw ſugar was of the quality

agreed

agreed on, and was delivered in reaſonable time, he is liable to the plaintiff for the price of it.

Verdict for the plaintiff, damages 108*l.* 14*s.* 6*d.*

The *Attorney General* and *Holroyd* for the plaintiff.

Garrow and *Burrough* for the defendant.

[Attornies *Weſtons* and *Millett*.]

Vide Barker *v.* Sutton, *Lent Aſſize, Norf.* 1662, Trials p. Pais, 369. Gilb. Law Ev. 191, where the plaintiff having ſold 60 comb of rye to the defendant, to be delivered before Michaelmas, and having delivered 50 comb, brought his action for the amount of that parcel, and it was reſolved by HALE, C. B. that though the agreement was entire, the ſeveral deliveries made ſeveral contracts; and that though the payment was to be on the laſt delivery. yet a time being ſet for delivery, it was intended to be paid when the delivery ſhould have been;—and that the defendant muſt reſort to his remedy as to the delivery of the reſidue. But in this caſe there might have been ſome evidence of the rye delivered by the plaintiff, being abſolutely accepted by the defendant; and of late years, there has been a ſtrong inclination in our courts, as far as is conſiſtent with the rules of law, to do ſubſtantial juſtice between the parties at once, without creating the neceſſity for a croſs action.—Farnſworth *v.* Garrard, *ante* 38.

POOL *v.* BOUSFIELD.

Same day.

An agrrement by the payee of a bill of exchange, to diſcharge a perſon liable upon it, in conſideration that the latter would not move the court of King's Bench againſt him for a miſdemeanor is illegal and void.

THE plaintiff declared as payee of a bill of exchange for 104*l.* 8*s.* drawn by one Mould on, and accepted by the defendant.

The defence was, that the plaintiff had diſcharged the drawer as to part of the bill, and the acceptor for the reſidue, knowing that the conſideration had been

divided between them.—To eſtabliſh this, Mould himſelf was offered, and upon argument admitted, as a witneſs (*a*). He proved the execution of an agreement, by which the plaintiff for good and legal conſiderations had releaſed the ſum of 54*l.* 8*s.* part of the money ſpecified in the bill. He further gave in evidence, that upon his undertaking not to move the court of King's Bench againſt the plaintiff, the latter engaged to diſcharge the acceptor as to the 50*l.* which he owed on this bill of exchange.

Lord ELLENBORGUCH aſked what was the nature of the motion intended to be made?—If it was that the plaintiff might anſwer the matters of an affidavit?

The witneſs anſwering, that this was the object he had in view, and which he agreed to forego,

Lord ELLENBOROUGH ſaid, the agreement was corrupt and invalid, and that therefore, *pro tanto*, the plaintiff muſt recover.

Verdict for the plaintiff with 50*l.* damages.

Garrow and ——— for the plaintiff.

The *Attorney General* for the defendant.

[Attornies, *White* and *Perſon*.]

(*a*) 1 T. R. 300.—7 T. R. 601.—2 Eaſt. 458.

Vide Collins *v.* Blantern, 2 Wilſ. 347, and the caſes there cited.—Drage *v.* Ibberſon, 2 Eſp. Caſ. 643.

MURPHY *v.* MARLOW AND TRAUNT.

Wednesday, Dec. 9.

THIS was opened as an action of assumpsit against two partners, for work and labour; wherein Marlow had pleaded the general issue, and Traunt had suffered judgment by default.

The *nisi prius* record may be amended in court after the cause is called on, by a rule made *instanter* on the consent of both parties.

Lord ELLENBOROUOH however, on examining the record, discovered that Marlow was there first made to plead *non assumpsit*, and afterwards represented as saying nothing in bar or preclusion of the action; while it did not appear that Traunt had come in at all. His Lordship therefore suspended the trial.—On this the parties expressed a wish, to waive the objection, and, if it were possible, that the trial might proceed.

Lord ELLENBOROUGH said, the record might now be amended by rule of the court.—Accordingly he directed Mr. Lowten, after taking minutes for drawing up the rule, to make the proper alterations; and Traunt's name being substituted for Marlow's as suffering judgment by default, the jury were resworn, and the trial proceeded.

Friday, Dec. 11.

BOYCE *v.* BAYLIFFE.

In an action for falſe impriſonment on board a ſhip, the plaintiff cannot recover as ſpecial damage, the expence he incurred in leaving the ſhip, and taking his paſſage on board another, unleſs the injury continued to the moment of his tranſhipment.

ASSAULT and falſe impriſonment, on board the Huddart Eaſt Indiaman, in a voyage from Bombay to London; *per quod* the plaintiff was obliged to leave that ſhip and take his paſſage home on board another.

It appeared in evidence, that the plaintiff was a paſſenger in the gunner's meſs, and that the defendant was captain of the ſhip. On the evening of 11th May 1805, near the Cape of Good Hope, two ſtrange ſail were deſcried in the offing, ſuppoſed to be enemies. The defendant immediately muſtered all hands on deck, and aſſigned to every one his ſtation. The plaintiff with the other paſſengers he ordered on the poop, where they were to fight with ſmall arms. This order all readily obeyed, except the plaintiff, who conceiving he had been ill uſed by the defendant ſometime before in being forbidden to walk on the poop, poſitively refuſed to go there, but offered to fight in any other part of the ſhip with his meſſmates. The defendant for this contumacy, ordered him to be carried upon the poop, and there kept him in irons during the whole night. Next morning no enemy appeared; and the Huddart arrived ſafe at St. Helena, on the 17th of June. Here the plaintiff quitted her, and gave 100*l.* for his paſſage home on board another ſhip.

There being no juſtification on the record, and the impriſonment being clearly proved, the only queſtion of law which aroſe in the cauſe was concerning the plaintiff's right to recover the 100 *l.* as ſpecial damage. —It was contended on the one ſide, that as he might have continued on board the Huddart till the end of the voyage, his quitting her was voluntary and no neceſſary conſequence of the treſpaſs; while it was maintained on the other ſide that it was enough if he could not continue on board with the reſpectability and comfort he had enjoyed before or might enjoy in another ſhip; and that this was impoſſible after the outrage he had ſuffered.

Lord ELLENBOROUGH ſaid it was neceſſary the ſpecial damage ſhould be cloſely connected with the treſpaſs, which was the foundation of the action. But here the impriſonment was not the *cauſa proxima* of the tranſhipment. The latter was remote in point of time, and the plaintiff was not driven to it in order to redeem himſelf from any great peril or grievance. That a man may tranſhip himſelf and throw the expence of this upon another, the injury muſt continue down to the moment of his leaving the firſt ſhip, and he muſt then act with a view to the preſervation of his life, or at leaſt from a reaſonable regard to his own ſafety.—To ſhew how far attempts of this kind might be carried, if this neceſſary connection were not inſiſted on; his Lordſhip alluded to a caſe which uſed to be mentioned by Lord ALVANLEY, where the

plaintiff

plaintiff complained of falſe impriſonment, *per quod*, being confined on ſhore, he loſt a lieutenancy (*a*).

Verdict for the plaintiff, damages 80 *l.*

Garrow, *Parke*, and *Reader*, for the plaintiff.

The *Attorney Gereral* and *Lawes* for the defendant.

Quære as to the authority of the captain of a merchantman, when a paſſenger refuſes, on the approach of an enemy, to take the ſtation aſſigned him.

N.B. Soon after this caſe was opened, Lord ELLENBOURGH ſaid he did not know, till he ſhould hear all the facts, whether the defendant might not have *juſtified*. A captain of a ſhip had authority to do what was neceſſary for the ſafety of thoſe on board. On the approach of an enemy he had a right to aſſign them all a ſtation, which it was their duty to accept. As the plaintiff had refuſed to obey the orders given him, perhaps his confinement might be neceſſary to the diſcipline of the crew, and the ſecurity of the veſſel; and if ſo, would be juſtifiable in law.—However, when it came out that the plaintiff had been kept all night in irons on the poop, his Lordſhip clearly held that the defendant had exceeded the limits of his authority (*b*).

If while A. is unlawfully impriſoned by B.,

The next cauſe was *Boyce* v. *Douglas*, wherein the plaintiff declared in the ſame manner as above.—The

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(*a*) Bul. N.P. 6, 7.—Tidds. Prac. 399, 400.

(*b*) Molloy, book 2, ch. 3.—Watſon *v.* Chriſtie, 2 B. and P. 224.—Abbott on Shipping, ch. 4.

defendant

defendant Major Douglas, a paſſenger on board the Huddart, while they were about to put the plaintiff in irons on this occaſion, held up the butt end of a muſket to him in a menacing manner, and threatened to ſtrike him.

C. commits an aſſault upon him, C. is guilty of the falſe impriſonment as well as B., and if A. ſues both ſeparately, the pendency of one ſuit may be be pleaded in abatement of the other.

The *Attorney General*, with a view to coſts, ſuppoſing the damages would be under 40*s*. denied that this defendant had been concerned in the impriſonment, although he might have committed an aſſault in addition to Captain Bayliffe's.

Lord ELLENBOROUGH decidedly thought that the defendant was implicated in the falſe impriſonment, having committed an aſſault in aid of thoſe who had the plaintiff in their cuſtody ; and that as the treſpaſs in this action was ſubſtantially the ſame as that in the laſt, the defendant might have pleaded in abatement the pendency of another ſuit.—Verdict for the plaintiff, damages 40*s*.

[Attornies, *Morgan* and *James*.]

Vide 4 Blac. Com. 36.—Bul. 53.—Lutw. 33.— 3 Inſt. Cl. N. P. 94.—Latch 262.—Sty. 111.

HORN *v.* NOEL.

Same day.

THIS was an action of aſſumpſit againſt the defendant, Amelia Noel, as acceptor of a bill of exchange.—Plea, the general iſſue.

Semble, that to prove a Jewiſh marriage, it is not enough to produce witneſſes who were preſent at the ceremony in the ſynagogue ; but that the written contract between the parties ſhould be produced, and the execution of it proved.

The

The plaintiff's caſe being proved, coverture in the defendant was ſet up as a bar to the action. To eſtabliſh this, two witneſſes were called, who ſwore that they were preſent in the Jewiſh Synagogue, in Leadenhall ſtreet, in the year 1781, when the defendant was married by the high prieſt to Henry Noah, who had ſince taken the name of Noel, and was ſtill alive.

Garrow for the plaintiff contended that this evidence was inſufficient. It was neceſſary for the defendant to ſhew that a marriage had been celebrated according to the rites of the Jews. But with them, what took place in the ſynagogue was merely a ratification of a previous written contract; and as that contract was eſſential to the validity of the marriage, it ought now to be produced and proved.

The contract, in the Hebrew tongue, was accordingly put in, and tranſlated by means of an interpreter.

Plaintiff nonſuited.

Garrow and *Eſpinaſſe* for the plaintiff.

Park for the defendant.

[Attornies, *Willoughby* and *Rutherford.*]

Vide Stat. 26 Geo. 2. c. 33. §. 18.—Bul. N.P. 113, 4.—As to the *diſſolution* of a Jewiſh marriage, *vide* Ganer *v.* Lady Laneſborough, Peak. Caſ. 17.

BUCHANAN *v.* RUCKER.

Saturday, Dec. 12.

ASSUMPSIT on a judgment of the court of Common Pleas, in the iſland of Tobago, for 2,030*l.* 3*s.* 3*d.* currency, alleged in the declaration to be of the value of 2,000*l.* ſterling; with the common money counts. Plea, *non aſſumpſit.*

No action will lie upon a foreign judgment, on the face of which it appears, that the defendant, not reſident within the juriſdiction of the foreign court, was neither ſerved with proceſs, nor came in to defend the action; although ſuch judgment may have been obtained according to the courſe and practice of the court in ſimilar caſes.

The judgment being proved, by a witneſs ſwearing to the hand-writing of E. PIGOTT Eſq. the Chief Juſtice of the court, and ſaying, that he would have acted upon the ſeal appended to it as the ſeal of the iſland (*a*),—

The *Attorney General* for the defendant obſerved, he had to ſtate an objection, which muſt be fatal to the preſent action. A foreign judgment was *prima facie* evidence of a debt; but it might be rebutted; and if the defendant could either ſhew that the judgment was bad on the face of it, or had been irregularly obtained, it would not be inforced by the courts of juſtice in this country. In the preſent caſe by inſpecting the copy of the judgment, it appeared that it had been given againſt the defendant, without his ever having been ſerved with proceſs, or having had any opportunity to defend the action. The judgment, after an entry of the declaration, ſet out the following

(*a*) Henry *v.* Adey, 3 Eaſt, 221.

ſummons,

ſummons, dated 25th June, 1806: "GEORGE the "Third, &c. To the Provoſt Marſhal of our iſland of "Tobago, or his lawful deputy, greeting: We com- "mand you to ſummon Sigiſmund Rucker, formerly "of the city of Dunkirk, and now of the city of Lon- "don, merchant, to be and appear before the Juſtices "of our court of Common Pleas, to be held for our "ſaid iſland, on the 1ſt day of July next enſuing, at "eight o'clock of the morning, at the town of Scar- "borough, then and there to anſwer the action com- "menced againſt him, by Alexander Buchanan, as "contained in the declaration hereunto annexed." To which there was the following return: "*Served, by* "*William Smith, nailing up a copy of the declaration at* "*the Court Houſe door, the 25th of June* 1806." Whereupon judgment was given by default. But it was impoſſible that ſuch a judgment could create any liability, or raiſe an aſſumpſit for the defendant to diſcharge it.

Garrow for the plaintiff contended, that this was the practice of the court of Common Pleas in Tobago where a perſon ſued was not reſident within the iſland: and the witneſs who had proved the judgment, being interrogated to this point, ſaid he had lived 16 or 17 years in Tobago, and though not connected with the law, he had frequently ſeen declarations nailed to the Court Houſe door, as was repreſented to have been done here.

The *Attorney General* objected, that this was not the proper way to prove the laws of the iſland of To- bago.

bago (*a*). Theſe were in writing, and ought to be produced. If the preſent were conſidered a point of practice, ſtill it ought to be proved by ſome one converſant with the ſubject, and not by a merchant or a planter, who might ſo eaſily be miſtaken about it. At any rate, the practice could not be ſupported.

Garrow anſwered, that the nature of the caſe admitted of no better evidence. It was impoſſible to produce the Chief Juſtice in perſon, and this gentleman muſt be much better acquainted with the matter than an attorney's clerk who had been in the iſland a few months. Beſides, the proceedings muſt *prima facie* be taken to be regular. The judgment was certified under the hand of the Chief Juſtice, who thus gave evidence that it had been obtained according to the courſe and practice of the court. The preſumption

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(*a*) *Vide* Bohtlinck *v.* Inglis, 3 Eſp. Caſ. 58. 3 Eaſt, 381. S. C. Freemoult *v.* Dedire, 1 P. W. 431. Ganer *v.* Lady Laneſborough, Peak. Caſ. 18.

It ſeems, that to prove *the acts of ſtate* of a foreign government, copies ſhould be produced, examined by the public archives abroad. *Richardſon* v. *Anderſon. Sittings after M.T.* 1805. In this caſe defendant produced as evidence a book purporting to be a collection of treaties concluded by America, which was declared to be publiſhed by authority there as a regular copy of the archives in Waſhington, and would have proved by the American miniſter reſident at this court, that it was the rule of his conduct. Lord Ellenborough refuſed to admit this evidence; and held, that it was neceſſary to have a copy examined with the archives in America: he ſaid, he would not have admitted a book of treaties with Spain, proved to have been printed by the king's printer there.—Rex *v.* Holt, 5 T. R. 436. Bul. N. P. 226.

was in favour of a foreign judgment, as well of a judgment obtained in one of the courts of this country.

Lord ELLENBOROUGH.—That may be ſo, if the judgment appears on the face of it conſiſtent with reaſon and juſtice; but it is contrary to the firſt principles of reaſon and juſtice that either in civil or criminal proceedings, a man ſhould be condemned before he is heard. To prove the practice, there ought ſtrictly to be ſome witneſs profeſſionally acquainted with it. This, however, it is unneceſſary to conſider; for if the practice were proved, it is *mala praxis*, and cannot be ſanctioned. If a judgment could thus be recovered againſt any one behind his back, a man would have nothing more to do but go to Tobago, there ſue us to any amount, and then return to this country to put his judgments in force againſt us. In a caſe ſomewhat like the preſent that came before Lord *Kenyon*, the defendant had reſided in the iſland, had property there, and had left a power of attorney behind him: therefore, he might be conſidered as virtually preſent. But the practice here contended for is oppoſite to right reaſon, and ſhall not prevail.

Garrow ſuggeſted, that in the court of King's Bench, perſonal ſervice was in many caſes diſpenſed with, and when a party was abſent from the country, or kept out of the way, it was uſual to order, that leaving notices, &c. at his laſt place of abode, or fixing copies of them on ſome particular ſpot, ſhould be deemed good ſervice.

Lord

Lord ELLENBOROUGH.—That is only where a man has reſided in this country, and has ſome known place of reſidence. A foreigner, or a ſubject who is abroad, may be outlawed here, and his effects, if he has any in the country, may be ſeized under the outlawry; but it is impoſſible for the plaintiff to recover a judgment againſt him, when he has never appeared to the action. The defendant not being reſident in Tobago, there was no pretence for ſuing him in the courts of that colony.——In anſwer to an obſervation from the plaintiff's counſel, that the judgment or ſentence of a foreign court muſt be received as evidence of the right it eſtabliſhes, and muſt at any rate be taken to be juſt and regular, till the contrary is ſhewn by extrinſic proof;—his Lordſhip ſaid, there might be ſuch glaring injuſtice on the face of a foreign judgment, or it might have a vice rendering it ſo ludicrous, that it could not raiſe an *aſſumpſit*, and if ſubmitted to the juriſdiction of the courts of this country, could not be inforced. He therefore directed *a nonſuit*.

Garrow and *Taddy* for the plaintiff.

The *Attorney General* for the defendant.

[Attornies, *Winter* & Co. and *Lewis*.]

Vide Walker *v.* Witter, Doug. 1. Crawford *v.* Whitall. Ib. 4. (1)—Galbraith *v.* Neville. Ib. 5. (2) Collins *v.* Lord Mathew, 5 Eaſt, 475 (*b*).

Same day.

HURST *v.* WATKIS.

Although the plaintiff, after delivering a *particular* of his demand, cannot at the trial himself give evidence out of it, yet if the defendant's evidence shews that there were other items, which he might have included in his demand, he is entitled to recover all that appears to be due to him.

ASSUMPSIT for money had and received, and on an account stated.

The plaintiff and defendant were partners, and the action was brought to recover a balance due on a statement of accounts. There had been two sets of accounts kept between the parties;—one touching their partnership concerns, and another concerning some separate money transactions.

The plaintiff gave in evidence an account rendered by the defendant, wherein upon these separate transactions he had made himself a debtor to the plaintiff, to the amount of between 1,700*l.* and 1,800*l.* In answer to this, the defendant produced an account subsequently rendered by the plaintiff; according to which, on the same transactions, there appeared to be a balance due to the defendant. But on the opposite side of the page, was a statement of the partnership accounts, shewing a balance of above 3,000*l.* in favour of the plaintiff.

Lord ELLENBOROUGH said, the defendant had made the whole of this paper evidence, and must abide the consequences.

It was then objected, that the plaintiff could not go out of his *particular*, which confined him to the balance due on the separate accounts.

Lord ELLENBOROUGH.—If the plaintiff, ignorant of the nature and extent of his demand, has given an imperfect particular of it, to that he ſhall nevertheleſs be reſtricted in his own evidence, and he ſhall not be allowed directly to ſeek to recover any thing *ultra* the contents of the particular. But if the defendant, in attempting to defeat this reſtricted claim, gives him a better caſe than he was at liberty to make for himſelf, he is now entitled to a verdict for all that is proved to be due to him: what he could not have inſiſted on as a right, he may receive as a boon. Here the joint account by an adjuſtment has become a ſeparate one, and the balance due upon it is a liquidated debt, which the plaintiff may recover in the preſent action.

It was then agreed between the parties, that the plaintiff ſhould take a verdict for 1,785*l.*

The *Attorney General* and *Taddy* for the plaintiff.

Garrow and *Scarlet* for the defendant.

[Attorneys, *Palmer & Co.* and *Milne.*]

Vide Foſter *v.* Allanſon, 2 T. R. 479. Smith *v.* Barrow, 2 T. R. 476. Watſ. Law Partn. 396. 1 Tid. Pr. 527. 2 Sell. Pr. 463.

If the plaintiff's particular conveys the requiſite information to the defendant, however inaccurately it be drawn up, it is ſufficient. *Day and others, aſſignees, &c* v *Boyer. Sittings after H. T.* 1806. Aſſumpſit for money paid by the bankrupt before his bankruptcy to the uſe of the defendant. The plaintiffs, under a judge's order, had delivered a particular of their demand, containing, among other things, the following items:

	£.	s.	d.
To caſh paid Froggat and Co. - -	80	13	6
To ditto paid Hoffan and Co. - -	93	8	0
To ditto ditto -	80	13	6

Evidence being given of the payment

payment of the firſt ſum to Froggat and Co., plaintiffs were proceeding to ſhew, that a ſecond ſum of 80*l.* 13*s.* 6*d.* had likewiſe been paid to them by the bankrupt at the defendant's requeſt; when it was objected, that there was no mention made in the *particular* of ſuch a ſum, and that plaintiffs therefore could not give it in evidence. The plaintiffs counſel offered to ſhew that this was a clerical error; as the item "To ditto paid Hoffan and Co. &c." had been inſerted by miſtake between the other two items, and that the laſt item was intended, and muſt have been underſtood, to refer to Froggat and Co. Upon this, Lord Ellenborough overruled the objection, and ſaid, that if the defendant could ſhew by affidavit, that he had been miſled by the plaintiff's particular, as to the ſecond payment to Froggat and Co., the court of K. B. would ſet aſide that ſum; but that he ſhould not refuſe evidence of it at *niſi prius*.

Same day.

GOLDIE *v.* SHUTTLEWORTH.

In convenant, if after a plea of non eſt factum, the defendant at the trial admits *the due execution of the ſpecialty mentioned in the declaration*, he may ſtill take advantage of a variance.

COVENANT on articles of agreement for the payment of an annuity. Plea, *non eſt factum*.

Littledale for the plaintiff, put in an admiſſion of the defendant's attorney in theſe words: "I admit the due execution of the articles of agreement dated the 23d day of February 1782, mentioned in the declaration in this cauſe."

The *Attorney Geueral* for the defendant having intimated, that he meant to take advantage of a *variance*,

Littledale inſiſted, that after the admiſſion juſt read this could not be done. The defendant had admitted

the articles of agreement mentioned in the declaration to be his deed. Things now ſtood, therefore, as if he had withdrawn his plea, and the breaches aſſigned as to the non-payment of the annuity were uncontradicted on the record. It was not neceſſary for him even to put in the articles of agreement, ſo that the defendant could not poſſibly object any variance.

Lord ELLENBOROUOH, however, ſaid, the admiſſion only diſpenſed with the attendance of the atteſting witneſs, and conceded what he would have proved, viz. the due execution of certain articles of agreement by the defendant. The object of the parties was probably only to ſave expence. Had the admiſſion been "*as* mentioned," or "*as* ſtated," or *as* recited" in the declaration, its effect might have been different; but ſtanding as it did, it placed the parties exactly in the ſame ſituation, as if the atteſting witneſs had attended, and proved the execution of the articles of agreement. In that caſe, they muſt ſtill have been put in and read, and it would have been open to the defendant to take advantage of any variance between them and the declaration.

The *Attorney General* afterwards pointed out the ſuppoſed variance, but proved to have been miſinſtructed.

The plaintiff, therefore, had a verdict to the amount of his demand.

Littledale for the plaintiff:

The *Attorney General* for the defendant.

[Attornies, *Blackſtock* and *Windle*.]

Monday Dec. 14

FRENCH AND OTHERS ASSIGNEES OF HILL, A BANKRUPT, *v.* PATTEN.

If a policy of insurance is altered as to the subject matter insured, after the risk has attached, without having been re-stamped, it is not only void as altered, but it is completely vitiated, and ceases to be available to any legal purpose.

THE plaintiffs declared on a policy of insurance on *ship and outfit*, in a voyage from London to the Southern whale fishery and back again, at a premium of 15 guineas per cent.

The policy was effected in September 1804, and was intended by the assured to be *on ship and goods*. In March 1805, before any advice had been received from the ship on her voyage, the underwriters consented to rectify this mistake; and the following memorandum with a new date was inserted in the policy: "It is hereby agreed, that the interest on this policy shall be on *ship and goods* instead of *ship and outfit* as originally declared."

The ship being lost in the course of the voyage, Hill, before his bankruptcy, brought an action against the present defendant as one of the underwriters; and declared upon the policy, as covering *ship and goods* by virtue of the memorandum (*a*). It was objected at the trial, that the policy could not be substantially altered after the ship had sailed and the risk attached, without a new stamp, and that *goods* being a distinct matter of insurance from *outfit*, this alteration was

(*a*) There was no count in the original action on *ship and outfit*.

not

not within the exception of the ſtat. 35 Geo. 3. c. 63. §. 13., which enables the parties to make any alteration in the *terms or conditions* of a policy, ſo that the thing inſured ſhall remain the property of the ſame perſon.—The plaintiff had a verdict, ſubject to the opinion of the court, who afterwards reluctantly ordered a nonſuit to be entered;—the Chief Juſtice ſaying, that with all the unwillingneſs they could not but feel to give way to an objection, which the underwriters brought forward in deſpite of their own conſent on this ſubject once given, they were nevertheleſs obliged to give effect to it, by pronouncing that the terms of the act had not been complied with; that the policy, in its laſt and altered ſtate, was to be conſidered, on account of ſuch alteration, as an unſtamped policy, and that the contract it purported to contain was on that account void (*a*).

The declaration now recited the policy as it originally ſtood, taking no notice of the ſuperadded memorandum.

The facts were admitted, to raiſe the point of law; whether, under theſe circumſtances, this could now be conſidered a valid policy upon *ſhip and outfit?*

Park for the plaintiffs argued, that the policy was now to all legal purpoſes as it originally ſtood, and as if no alteration whatever had been made in it. The memorandum being unſtamped had been adjudged to

(*a*) Hill v. Patten, 8 Eaſt. 377.

be

be void; therefore it was a mere nullity, and had no ſort of operation. There was nothing in the act which ſaid, that a nude agreement written on the policy ſhould entirely vitiate it; nor, had the court above by any means decided that the inſtrument was altogether cancelled; the Judges had only pronounced the memorandum, and not the policy to be void. Had the alteration been made without the conſent of the underwriters, they might have complained that the inſtrument was vitiated by being defaced; but it was not competent to them to urge this objection, as nothing had been done but by their expreſs deſire. Therefore the policy being on a proper ſtamp was good at firſt, and ſtill remained in full force.

The *Attorney General* for the defendant ſaid, this was as if A. having once agreed to ſell B. a houſe in *Bedford-ſquare*, and by the deſire of B. it being changed in the contract into *Red Lion-ſquare*, when B. found he could not, for ſome reaſon or other, get his houſe in *Red Lion-ſquare*, he ſhould bring an action againſt A. for not ſelling him a houſe in *Bedford-ſquare*.

Lord ELLENBOROUGH.—I am afraid the policy is defaced, and no longer an available inſtrument. How can I take out thoſe words which are incorporated in the policy? The memorandum does not ſet up a ſecond valid contract, and it has vitiated the firſt. I am very ſorry to defeat the plaintiffs' claim, and I will do any thing that I can to help them. My opinion upon the ſubject is very clear; but I will leave the door open to farther inquiry. The plaintiffs may move to

ſet

ſet aſide the nonſuit, which I muſt direct.—You ſay "read theſe words out." I can not; for they appear amidſt the other terms of the inſurance. The policy tells its own ſtory.

Plaintiffs nonſuited.

Park and *Marryat* for the plaintiffs.

The *Attorney General* and *Garrow* for the defendant.

[Attornies, *Rivington* and *Crowder* & Co.]

Vide Pigot's caſe, 11 Co. 27. Vin. Abr. tit. Faits, 37.—2 Rol. Abr. 29. pl. 6.—Price *v.* Shute, 2 Moll. c. 10 § 28.—Maſters *v.* Miller, 4 T. R. 320. 2 H. Bl. 140. S. C.—Henfree *v.* Bromley, 6 Eaſt. 309.—Bates *v.* Grabham, 2 Salk. 444.—Long *v.* Moore, 3 Eſp. Caſ. 155. *in notis*.

BROMLEY *v.* HESSELTINE.

Same day.

ASSUMPSIT on a policy of inſurance on goods on board the Daniſh ſhip Gherard, at and from Hull to Meſſina.—The declaration averred the intereſt to be in Joſeph Chemin and Peter Della Longa and Co. ſubjects of the King of Tuſcany.—Plea, the general iſſue.

Semble, that an inſurance on goods the property of a neutral, to a port occupied by the enemy is void.—But though a neutral ſhould himſelf be reſident in a place occupied by the enemy, an inſurance on goods his property to a neutral or friendly port is valid.

The ſhip was captured on her voyage and carried into Algeziras, where her cargo was condemned for want of a certificate of neutrality.

The

The defence firſt attempted was, that the goods were deſtined, not for Meſſina, but Leghorn; and that, as Leghorn had been ſome time before permanently occupied by the French troops, an inſurance on ſuch a voyage by an Engliſh ſubject was illegal and void (*a*). The only evidence in ſupport of this was

(*a*) Mr. Serjeant MARSHALL, in his excellent book on the Law of Inſurance, p. 38, cites Rotch *v.* Edie, 6. T. R. 413. as an authority to ſhew, "that a neutral, "though reſiding in the ene-"my's country, and carrying "on trade there in partnerſhip "with an alien enemy, may in-"ſure his intereſt in the joint "property." But, with very great ſubmiſſion, ſuch a doctrine cannot be deduced from that caſe. 1*ſt*, The plaintiff and *Berard*, the French ſubject, reſiding at L'Orient, were not partners, but partowners; "they "had each a half concern and "intereſt in the ſhips and their "ſtores," and *Berard's* intereſt was inſured by ſeparate policies. —2*dly*, France was not an enemy's country, either when the policy was effected, or when the loſs happened. The policy was underwritten by the defendant in November 1792, and the embargo was laid on, February 5th 1793. —3*dly*, The plaintiff could not be conſidered as a neutral *reſiding* in the enemy's country; for ſhortly before making his inſurances, he came to England, and though he went back to France previous to the commencement of hoſtilities and remained there about four months, he then returned again to England, and reſided here conſtantly afterwards.—*Laſtly*, the reaſon aſſigned for adjudging the policy to be valid was, that the conſequence of allowing this objection would be, that it would be illegal to inſure the property of a neutral (not in an "enemy's" port, as is ſuppoſed, but) in a *foreign* port. The view with which the defendant's counſel urged, that the plaintiff was domiciled in France, and owed a temporary allegiance to the French government, was to ſhew, not that he adhered to our king's enemies, but that he could not lawfully inſure againſt the acts of the government to which he owed allegiance, and that as his aſſent was to be implied to to theſe acts, he could not take advantage of them againſt the underwriters.

an

an expreſſion in the bill of lading; which ſtated, that the goods were to be delivered to Joſeph Chemin and Peter Della Longa and Co., *in Leghorn.* But the captain of the ſhip ſwore poſitively, that, though the conſignees reſided in Leghorn, he was proceeding when he was captured to Meſſina in Sicily, there to deliver the whole of his cargo.

Garrow for the defendant then objected, that it appeared at any rate that the conſignees and owners of the goods, who were aliens, were reſiding in a place then in a ſtate of declared hoſtility to this country; and that as a trading by them under ſuch circumſtances certainly tended to the aiding and comforting of the King's enemies, it could not be legally covered by any inſurance.

Lord ELLENBOROUGH.—I don't know that merely becauſe an alien happens to be reſident in an enemy's country, goods to be delivered for him at a neutral or friendly port, are on that account uninſureable. Suppoſe a Britiſh merchant to be entrapped and confined in an enemy's country, it can ſcarcely be ſaid that all the trade he may ſtill carry on is in aid of the King's enemies, illegal and incapable of being inſured.

The plaintiff had a verdict (*a*).

The *Attorney General* and *Curwood* for the plaintiff.

Garrow and *Bolland* for the defendant.

[Attornies, *Courteen* and *Exley.*]

(*a*) In M'Connell *v.* Hector, 3 B. and P. 113, the court of C. P. held that an Engliſh ſubject who lives and carries on trade under the *protection and for the benefit* of an hoſtile ſtate, in

is to be considered to all civil purposes as much an alien enemy as if he were born there.—*Vide* Gist *v.* Mason, 1 T. R. 84.—Brandon *v.* Nesbitt, 6 T. R. 23.—Briscow *v.* Towers, Ib. 35.—Casseres *v.* Bell, 8 T. R. 166.

Same day.

WILBEAM *v.* ASHTON.

13 Law 341.

In an action on an agreement to serve the plaintiff under a penalty, the jury cannot *exceed* the penalty in damages, and within it, are only to give the plaintiff a compensation for the loss he proves he has suffered.

ASSUMPSIT upon an agreement, whereby the defendant engaged to serve the plaintiff as a dresser of Spanish leather for the space of 4 years, under a penalty of 50*l.*

The *Attorney General* in opening the case for the plaintiff, observed it would be for his Lordship to decide, whether, upon proof of a breach of the agreement, the plaintiff would be entitled to the whole penalty, or only to a compensation for the loss he had suffered.

Lord ELLENBOROUGH.—The legal construction of such an agreement is this: beyond the penalty you shall not go; within it, you are to give the party any compensation which he can prove himself intitled to.

It appeared however, in this case, that the plaintiff had ordered the defendant to quit his service; and though the latter, on being subsequently asked his reason for leaving his master, said merely he did not like

like the ſituation, it was held that the contract was completely ended by the former diſcharge.

Verdict for the defendant.

The *Attorney General* and *Eſpinaſſe* for the plaintiff.

Garrow and *Park* for the defendant.

[Attornies, *Harding* and *Hurd.*]

Vide Aſtley *v.* Weldon, 2 B. and P. 346. where all the caſes on this ſubject are collected and reviewed. H. U. N. P. C. 43.

CORDWELL *v.* MARTIN.

Same day.

ASSUMPSIT by the indorſee againſt the acceptor of a bill of exchange for 300 *l.*, ſtated in the declaration to be dated 23d June 1807.

A. and B. for their mutual accommodation exchange acceptances, the bill accepted by A. being made to fall due ſome days ſooner than that accepted by B.—A. having kept the bill payable to his order 20 days in his poſſeſſion without negociating it, alters the date of the bill with the conſent of B., ſo as to poſtpone the payment 20 days, and then

The facts as admitted on both ſides were ſhortly theſe: On 3d June 1807, this bill was drawn by Giles, Rous, and Co., payable three months after date to their own order, and immediately accepted by the defendant. On the ſame day Giles, Rous, and Co., gave the defendant their acceptance for the ſame ſum, at 85 days, which would have put him in caſh to anſwer his own acceptance. The object on both ſides was

indorſes it to C. In an action at the ſuit of C. againſt B. *held* that, by this alteration, without a freſh ſtamp, the bill was vitiated.—*Semble* that the only alteration that may be made in a bill of exchange, without a freſh ſtamp, is when a miſtake in the terms of it is rectified before it gets abroad into the world.

was to negociate the bills. However, the bills remained reſpectively in the hands of the drawers, till the 23d of June. On that day Giles, Rous, and Co., wiſhing to negociate their bill, the ſubject of the preſent action, and wiſhing to poſtpone the time of its becoming due 20 days, altered the 3 in its date to 23, and indorſed it for a valuable conſideration to the plaintiff. At the ſame time they gave notice to the defendant to make a correſponding alteration in the croſs acceptance; who did ſo, and thus aſſented to the alteration in the bill which he himſelf had accepted. The queſtion was, whether this bill was vitiated by the alteration under theſe circumſtances for want of a freſh ſtamp?

The *Attorney General* for the plaintiff contended that the bill had never been negociated; and, that there was no caſe which decided that if a bill was altered by the conſent of all parties before getting into circulation, a freſh ſtamp was neceſſary. The bills here could not be conſidered as available while they remained in the hands of the drawers. They conferred a power of raiſing money; but till they went out into the world, they afforded no claim againſt the acceptors. Either might have been made an accommodation bill, by the other being returned; and therefore while they were quieſcent, any alteration might be made in them by conſent, as well as at the moment when they were originally framed.

Lord ELLENBOROUGH.—The bills were negociated by being exchanged, the one againſt the other. The drawers

drawers had then a veſted intereſt in them as a ſecurity againſt their reſpective acceptances. Beſides, the one was due before the other, and the preſent defendant might have himſelf ſued Giles and Rous, leaving them to their croſs action. The parties exchanged ſecurities, and were ſpecifically purchaſers of the bills accepted in their favour. Therefore the alteration of the bill in queſtion, after it ſo exiſted to theſe purpoſes, having been made without a freſh ſtamp, renders it null.

Garrow for the defendant, in confirmation of this doctrine, cited the caſe of Wilſon *v.* Juſtice (*a*); where a bill payable originally 9 months after date had been, by conſent of all parties, a fortnight after being in the hands of the payee, made payable 12 months after date, and Lord Kenyon held that the alteration made a new ſtamp neceſſary, and nonſuited the plaintiff.

Lord ELLENBOROUGH.—It appears to me that the only indulgence to be allowed in this reſpect is, where a miſtake has been made in the terms of a bill, and this is rectified before it gets abroad into the world, ſo that the whole may be conſtrued as one act.

Plaintiff nonſuited *.

The *Attorney General* and *Littledale* for the plaintiff.

Garrow for the defendant.

[Attornies *Cooper* and *Broughton.*]

* The Attorney General afterwards moved the court to ſet aſide this nonſuit; but a rule *niſi* was refuſed.

(*a*) Bailey on Bills, p. 24. *Vide* Bowman *v.* Nichol, 5 T. R. 537.—1 Eſp. Caſ. 81. S. C.—Kerſhaw *v.* Cox, 3 Eſp. Caſ. 246—Maſter *v.* Miller, 4 T. R. 320.—

Words written on a bill, which do not affect the re-

 ſponſibility

ſponſibility of the parties will not vitiate it.—— *Marſon* v. *Petit* —— *K. B. Sitt. after M. T.* 47 *G.* 3.—— Action by the indorſee againſt the acceptor of a bill of exchange. After the bill had been accepted by the defendant, the words *Preſcott and Co.* had been written under his name by the drawer, without his knowledge or aſſent, the plaintiff having refuſed to take the bill unleſs theſe words were added. It was contended that this was a material alteration in the bill, and diſcharged the defendant. Lord ELLENBOROUGH held that as the addition of theſe words did not alter the reſponſibilty of the acceptor, he was ſtill liable; but that if they had done ſo, they would have vitiated the bill.

Same day.

PORTHOUSE *v.* PARKER AND OTHERS

In an action againſt the drawers of a bill of exchange, drawn by a firm upon one partner, if it is proved that the bill was accepted by the drawee, this is evidence of its having been regularly drawn; and in ſuch action it is unneceſſary to prove that the drawers had notice of the bill being diſhonoured.

THIS was an action againſt the drawers of a bill of exchange, for 461 *l.* 3 *s.* at the ſuit of the payee.

The bill purported to be drawn by one Wood, as the agent of George, James, and John Parker, upon John Parker. There was no proof that Wood had authority from the defendants to draw the bill; but a witneſs ſwore that he, as the agent of John Parker, the drawee and one of the defendants, had accepted it on his account.

Lord ELLENBOROUGH held, that the bill having been accepted by order of one of the defendants, this was ſufficient evidence of its having been regularly drawn;

drawn; and further, that the acceptor being likewise a drawer, there would be no occasion for the plaintiff to prove that the defendants had received express notice of the dishonour of the bill, as this must necessarily have been known to one of them, and the knowledge of one was the knowledge of all.

Verdict for the plaintiff.

The *Attorney General* and *Espinasse* for the plaintiff.

Topping, *Marryat*, and *Holroyd*, for the defendant.

[Attornies, *Rutherford* and *White*.]

Vide Wilkinson *v.* Lutwidge, Stra. 648. Lambert *v.* Pack. Salk. 127. Lord Raym. 443. Chitty on Bills, 286. 291. Peak. Law Ev. 220.

Jones and another v. Radford, K.B. Sit. after H. T. 46 *G.* 3. —Action by the indorsee against the acceptor of a bill of exchange, payable to two persons, of the names of Hopkins and M'Michell. The bill had been indorsed by Hopkins in the name of himself and M'Michell, and defendant had accepted it with this indorsement upon it. The defence was, that the payees were not partners, and that the bill ought therefore to have been indorsed by both (*a*). But Lord Ellenborough held, that the defendant having accepted the bill indorsed by one for himself and the other, could not now dispute the regularity of this indorsement.

(*a*) Carwick *v.* Vickery, Doug. 653.

Tueſday, December 15.

MASHITER *v.* BULLER AND ANOTHER.

Although freight ſhould be made payable by the ſhipper *on the ſhipment of the goods, it* is not merely on that account earned, without a performance of the voyage.

THE plaintiff declared ſpecially, that in conſideration of his undertaking to receive on board his ſhip certain goods of the defendant, to be carried therein from London to Liſbon, the defendant promiſed to pay him a certain ſum of money on the ſhipment of the goods. The declaration alſo contained counts on an executed conſideration, and *indebitatus* counts for freight, &c.

The ſhip ſailed in January 1807, with the goods on board; but was loſt in the Downs. The plaintiff's counſel contended, that he had nevertheleſs a right to recover, as there was a ſpecial contract between the parties, that freight ſhould be paid on the ſhipping of the goods, without any reference to the voyage being completed; and that the only duty incumbent on the ſhip to earn the freight here was, to uſe her utmoſt endeavour to reach her port of deſtination.

The evidence of this ſuppoſed contract conſiſted of the bills of lading; ſome of which ſaid the goods were to be delivered at Liſbon, "freight for the ſaid goods being paid in London;" and others, "the ſhippers paying freight for the ſaid goods in London." But,

Lord ELLENBOROUGH held, that theſe words only meant that the freight ſhould be paid in London inſtead

ſtead of at Liſbon, and that they by no means diſpenſed with the performance of the voyage. He added, that if the defendants had paid the freight upon the ſhipment of the goods, they might have recovered every penny of it back again.

Plaintiff nonſuited.

Garrow and *Pooley* for the plaintiff.

The *Attorney General* and *Park* for the defendants.

[Attornies, *Glynes* and *Gatty*.]

In Blakey *v.* Dixon, 2 Boſ. & Pul. 321, the court of C. P. were of opinion, that an action may be brought for money agreed to be paid for receiving goods on board a ſhip, to be carried to a foreign port, the receiving the goods being a ſufficient conſideration to found a promiſe to pay the freight immediately; but decided, that ſuch money cannot be ſued for, or recovered, by the name of *freight*.

WARING AND OTHERS *v.* FAVENCK AND OTHERS.

If goods are bought by a broker, who does not mention his principal until he himſelf has become inſolvent, the principal cannot ſet off the price of the goods againſt a debt due to him from the broker, but is ſtill liable to the vender.

ASSUMPSIT for goods ſold and delivered. Plea, the general iſſue.

In June laſt, the plaintiffs employed Meſſrs. Kymer and M'Tagart as brokers, to ſell for them 62 bags of coffee. They ſold the whole of it accordingly to

Meſſrs. Kenyon and Son. The latter were likewiſe brokers, and actually bought this coffee for Meſſrs. Favenck and Co. the defendants. At the time of the ſale, however, Kenyon and Son did not mention that they were purchaſers for other perſons; and until after they had become bankrupts, it was not known who their principals were. Kymer and M'Tagart had at firſt entered in their books, "Bought of Waring and Co. 62 bags of coffee, &c. on account of Kenyon and Co."—they then added, "For Favenck and Co." Kenyon and Son, at the time of their bankruptcy, which happened before the ſum to be paid for the coffee was due, were indebted to the defendants to a greater amount.

The *Attorney General* contended, that under theſe circumſtances, the plaintiffs had no right to recover in the preſent action; as the defendants were entitled to ſet off the price of the coffee againſt the debt due to them from Kenyon and Son. Had the credit been originally given to the defendants, or had they been mentioned as the principals before the inſolvency of Kenyon and Son, he allowed they would have been ſtill reſponſible; but in fact they were left to ſuppoſe, as no farther enquiries were made by the plaintiffs or their brokers, that Kenyon and Son alone would be looked to for payment, and were thus induced to allow a large balance to remain in their hands, which they would otherwiſe have withdrawn.

Park for the plaintiffs denied that the doctrine of ſet-off had ever been carried farther than in George *v.* Clagget,

Clagget (*a*), where it was held, that if a factor ſells goods as his own, and the buyer knows nothing of any principal, the buyer may ſet-off any demand he may have on the factor againſt the demand for the goods made by the principal. But it was impoſſible that there ſhould be any right of ſet-off as between the buyer and his own broker.

Lord ELLENBOROUGH conſidered, that as the purchaſe had been made for the defendants by their agents, it was the ſame as if it had been made directly by the defendants themſelves; and that this was therefore the common caſe of goods ſold and delivered.

Verdict for the plaintiffs.

Park and *Richardſon* for the plaintiffs.

The *Attorney General* and *Garrow* for the defendants.

[Attornies, *Sherwood* and *Winter* & Co.]

(*a*) 7 T. R. 359.

Vide Rabone *v.* Williams, and Stracey *v.* Day, 7 T. R. 360, 361, Scrimſhire *v.* Alderton, 2 Stra. 1182. Eſcot *v.* Milward, *Sittings after M. T.* 24 Geo. 3. 1 Eſp. Ni. Pri. 106. Kymer *v.* Suwercropp, *poſt.*

EDMISTON *v.* WRIGHT, BART.

From a general power of attorney granted to one of two partners, the other can derive no authority.—If an order is given to an agent to deliver up any thing of which he had the management, his agency reſpecting it ceaſes as ſoon as he has delivered it up; and if he afterwards lays out money upon it for the benefit of the owner, this is a voluntary payment.

ASSUMPSIT for money paid. Plea, the general iſſue.

The defendant had a gang of negroes let out in Jamaica. A Mr. Leckey, the plaintiff's partner, was his attorney on record in that iſland, and he had the management of theſe negroes. In 1803 the defendant wiſhed to transfer them to his eſtates in Georgia, and for that purpoſe his agent at the latter place diſpatched the ſhip Mary, captain Beck, to Jamaica. The negroes were put on board by the plaintiff at Port Maria, and carried to Port Antonio; but as the captain had not got a permit for receiving them, they were there ſeized as forfeited, together with the ſhip and the reſt of her cargo. To releaſe them, the plaintiff paid as a compoſition 1200*l.* which he ſought to recover in this action.

Lord ELLENBOROUGH held, that it was a voluntary payment. The plaintiff could poſſeſs no general authority as partner of Mr. Leckey, whoſe powers as attorney on record were clearly incommunicable; and as manager of the gang of negroes, he was *functus officio*, after delivering them on board the ſhip.

Verdict for the defendant.

The *Attorney General*, *Dampier*, and *Horner*, for the plaintiffs.

Garrow and *Marryat* for the defendant.

[Attornies, *Bleſdale* & Co. and *Rivington*.]

GRAFF

GRAFF AND OTHERS, ASSIGNEES OF D. J. VANDER HOEVEN A BANKRUPT, *v.* GREFFULHE.

Same day.

ASSUMPSIT for money had and received, &c. The declaration contained two ſets of counts; one laying the promiſe to the bankrupt before his bankruptcy, and the other to the plaintiffs his aſſignees. Plea, the general iſſue.

If a trader on receiving bills of exchange from one of his creditors abroad, to whom he is indebted beyond the amount of them, after becoming inſolvent, but before committing an act of bankruptcy, delivers theſe bills, with the conſent of his other creditors, to an agent of the perſon who had remitted them, for the uſe of the latter if he ſhould be ultimately entitled to them; this is a legal and valid tranſaction, and if a commiſſion of bankrupt afterwards iſſues againſt the trader, his aſſignees cannot maintain an action againſt the truſtee to recover the produce of the bills.

D. J. Vander Hoeven eſtabliſhed himſelf as a merchant in London in the year 1800; and from thence till the time of his bankruptcy had various dealings with the houſe of Vander Hoeven and Co. of Amſterdam. In December 1804, he conſigned a parcel of ſugars to them, to be ſold on his account. On the 24th day of that month, he received a remittance from them by the poſt of three bills of exchange on different perſons in London, value together, 487*l.* 14*s.* 11*d.* in a letter, in which they ſay, "according to your deſire, we remit you incloſed againſt the conſignment of ſugar for your account 487*l.* 14*s.* 11*d.*, as per note, making to your debit 5,714,, 8 guilders, with which, pleaſe to do the needful, and to credit us in conformity." Two days before D. J. Vander Hoeven had ſtopped payment; but he did not commit any act of bankruptcy till the October following. On the 7th of January 1805, a meeting of his creditors was held at his houſe, when it was agreed, "that the remittances which had been made by Vander Hoeven and Co.

Co. of Amſterdam to D. J. Vander Hoeven ſince he ſtopped payment, ſhould be delivered to Mr. Greffulhe, for him to receive the money, and hold it for the perſons who might be ultimately entitled to it." The bills had been previouſly delivered by D. J. Vander Hoeven to the defendant, who was the agent in London of Vander Hoeven and Co. for their uſe and on their account. The defendant accordingly received payment of the bills as they reſpectively became due. A commiſſion of bankrupt iſſued againſt D. J. Vander Hoeven, on the 30th of October 1805. At the time when he conſigned the ſugar and received the remittance, he was, and afterwards continued, indebted to Vander Hoeven and Co. beyond the amount of the proceeds of the ſugar, and beyond the value of the remittance.

It was propoſed to take a verdict for the plaintiffs ſubject to the opinion of the court of King's Bench upon a caſe reſerved. But,

Lord ELLENBOROUGH ſaid, he could not grant a caſe, having ſo clear an opinion on the ſubject. Theſe bills did not paſs to the aſſignees as part of the effects of the bankrupt at the time of his bankruptcy. He had parted with them previouſly, and the poſſeſſion of the defendant could not be conſtrued as his poſſeſſion. Vander Hoeven and Co. being his creditors to a larger amount, were ultimately entitled to them, and were the perſons for whoſe uſe and benefit they had been depoſited with the defendant. A payment of the money, therefore, to Vander Hoeven and Co. would have

have reference back to the time of the depoſit of the bills, when D. J. Vander Hoeven might have himſelf directly returned them to Amſterdam.

The plaintiffs were nonſuited, with leave to move to ſet aſide the nonſuit, and enter a verdict.

The *Attorney General* and ——— for the plaintiffs.

Topping and *Richardſon* for the defendant.

[Attornies, *Elliſon* and *Dann* and Co.]

Vide Atkins v. Barweck, 1 Stra. 165.—Ruſt *v.* Cooper, Cowp. 629.—Nixon v. Jenkins, 2 H. Bl. 135.—Harman *v.* Fiſher, Cowp. 117.—Inglis *v.* Grant, 5 T. R. 530 —Singleton *v.* Butler, 2 B. and P. 283.

REX *v.* CAMPBELL.

Wedneſday, Dec. 16.

An averment in an information for contemptuous behaviour to a court, that the court conſiſts of A. B. and C. is made out by a bye-law, enacting, that A. B. and C. are ſuffi-

THIS was an information againſt the defendant, Hector Campbell, for contemptuous conduct to the College of Phyſicians. The information after ſetting forth the letters patent of 10 Hen. 8. incorporating the college, and empowering them to make bye laws for the government of the faculty in the city of London,

cient to hold the court, although others may be preſent and act as members of it.

London, and ſeven miles round, ſtated a bye-law to have been duly made, whereby it was ordered, "that there ſhould be an aſſembly of the ſaid college or commonalty, called the *comitia minora ſive cenſoria*, conſiſting of the preſident or vice-preſident, the regiſter, and four cenſors of the ſaid college, to be holden every month, and at other times, if called together by the preſident or the ſenior cenſor." It then went on to aver, that at a meeting of the *comitia minora*, held on the 6th day of March 1807, information was given that the defendant was practiſing as a phyſician within ſeven miles of London, without having obtained a licence from the college; that he was admoniſhed to deſiſt, and ſummoned to appear before the college; that he accordingly appeared before a meeting of the *comitia minora*, held on the 3d of April, when he called the preſident and cenſors "a parcel of qui tam ſcoundrels," and made uſe of various other violent and indecorous expreſſions. There were other counts, ſtating, that the defendant being afterwards interdicted from the practice of phyſic, wrote ſeveral libellous letters to the chief members of the college, and ſent back that part of the written interdiction, containing the atteſtation of Dr. Harvey, the regiſter, ſmeared with excrement.

The charter, &c. being proved, the bye-law was given in evidence, eſtabliſhing the *comitia minoria ſive cenſoria*. This law enacted, that the preſident or vice-preſident, the regiſter, and the four cenſors, *ſhould be ſufficient* to conſtitute the court.

Nolan for the defendant, objected that the averment in the information concerning the *comitia minora* was

was not made out by this bye-law. The information averred that the *comitia minora ſive cenſoria* "*conſiſted* of the preſident," &c. that is, muſt conſiſt of them, and them only, as its conſtituent members. But the bye-law only enacted, that they ſhould be ſufficient to hold the court;—that they ſhould be a quorum. It thus appeared that any other member, or all the other members of the college might aſſiſt at the court, as well as the preſident and cenſors; nor was it certain that their preſence was neceſſary to its being held. The court eſtabliſhed by this bye-law, was therefore very different from the one deſcribed in the information; and there was no proof of the legal exiſtence of ſuch a court as that towards which the defendant was charged with having acted contemptuouſly.—But,

Lord ELLENBOROUGH held the averment that the *comitia minora* conſiſted of the preſident and cenſors, &c. to be ſufficiently made out by the bye-law, enacting that they ſhould be ſufficient to hold the court; which was evidence that the court was legally conſtituted, at which they were averred to have been preſent.

The defendant was found *guilty*.

The *Attorney General*, *Garrow*, *Dampier*, and *C. Warren*, for the proſecution.

Nolan and *Gurney* for the Defendant.

[Attornies, *Roberts* and *Kirkman*.]

ROWORTH

Thurſday, December 17

ROWORTH *v.* WILKES.

If an article in a general compilation of literature and ſcience copies ſo much of a book, the copyright of which is veſted in another perſon, as to ſerve as a ſubſtitute for it; though there may have been no intention to pirate it or to injure its ſale; this is a violation of literary property, for which an action will lie to recover damages.—The proprietor of a print may maintain an action againſt any perſon who pirates it, although his name is not inſcribed on it purſuant to the directions of ſtat. 8 G. 2. c. 13. §. 1.

ACTION on the caſe for pirating a book and certain prints contained in it.

The firſt count of the declaration ſtated, that the plaintiff was the author and proprietor of the copywright of a certain book, firſt publiſhed within fourteen years laſt paſt, intitled, "The art of defence on foot with the broadſword, &c." and had printed and publiſhed for ſale divers, to wit 500 copies thereof; yet that the defendant wrongfully and injurioufly publiſhed, expoſed to ſale, and ſold divers, to wit 3000, copies of a certain other book or work, entitled "Encyclopædia Londinenſis, or an univerſal dictionary of arts and ſciences and literature," which had been before that time wrongfully and injurioufly copied from the ſaid book of the plaintiff without his conſent.—The eleven following counts were nearly the ſame; ſome of them omitting to ſtate that the plaintiff had *publiſhed* the one work, or that the defendant had *ſold* the ſecond; others ſtating that the defendant had copied *great part* of the plaintiff's work, and *expoſed his work to ſale*, without the plaintiff's conſent; and others averring only that the plaintiff was lawfully entitled to, and had the *ſole right of printing* the work in queſtion.—The thirteenth count ſtated that the plaintiff after the 24th day of June 1777, mentioned in a certain act of parliament, made, &c. entitled, &c. (17 Geo. 3. c. 57.) to wit, on, &c. was

and from thenceforth hitherto hath been and ſtill is the proprietor of certain prints, which had been theretofore etched in Great Britain, that is to ſay, of a certain print entitled "Inſide Guard," alſo of a certain other print, &c. and the ſaid plaintiff during all the time aforeſaid had been and was lawfully entitled to, and ſtill has and is lawfully entitled to the ſole right and liberty of printing and reprinting the ſaid prints, to wit at, &c. yet the ſaid defendant well knowing the premiſes, but diſregarding the ſtatute in ſuch caſe made and provided, and contriving, &c. to injure the ſaid plaintiff ſo being the proprietor of the ſaid prints as aforeſaid; after the ſaid 24th day of June in the year 1777, and whilſt the ſaid plaintiff was ſuch proprietor of the ſaid prints as aforeſaid, to wit, on, &c. and on divers, &c. at &c. aforeſaid did publiſh and cauſe, &c. divers, to wit 3000 copies of each of the ſaid prints, whereof the ſaid plaintiff ſo was proprietor as aforeſaid, without the conſent of the ſaid plaintiff and againſt his will; by means of the committing of which ſaid laſt mentioned grievances he the ſaid plaintiff hath been and is greatly injured in his ſaid property in the ſaid prints, and hath loſt and been deprived of divers great gains, &c. to wit, at, &c. aforeſaid. The laſt count was exactly the ſame, ſtating only that the defendant *expoſed the prints to ſale.*

It appeared in evidence that the plaintiff publiſhed the firſt edition of his treatiſe on fencing, illuſtrated with engravings in the year 1798, and that it contained conſiderable novelty, particularly in uniting the Auſtrian and Highland methods of uſing the broad ſword.

ſword. In 1804 he publiſhed a third and improved edition, conſiſting of 118 pages and a conſiderable number of new plates, at half a guinea a copy. The plates had not his name upon them as the act directs, but that of Egerton the bookſeller.—The defendant is editor and proprietor of the Encyclopædia Londinenſis, a work which has been for ſome time coming out in numbers. Proceeding in alphabetical order, in 1805 he had arrived at the head "*Fencing*;" when he publiſhed a number with this title, containing ſeventy-five pages of the plaintiff's treatiſe, and three engravings, repreſenting figures in exactly the ſame attitudes with the plaintiff's, but diſguiſed by a different coſtume. About 2000 of this number of the Encyclopædia were ſold at eight-pence a copy; which was not beyond the uſual ſale of the work.

The *Attorney General*, of counſel for the defendant, allowed, that if the number of the Encyclopedia upon "*Fencing*" had been publiſhed as a ſeparate and diſtinct treatiſe, it might have been conſidered a piracy of the plaintiff's book, for which an action would lie; but contended that, as it formed only a ſmall part of a great compilation of literature, it was no invaſion of copyright of which the plaintiff could complain in a court of juſtice. There was here no intention to meet the plaintiff's work in the market, and there was no good reaſon to ſuppoſe that the ſale of it had been in any degree impaired. In a dictionary of all arts and ſciences the compiler was juſtified in taking larger extracts than in another work of the ſame deſcription with that copied. The public were thus benefited, and no in-

dividual ſuffered; ſince people would never purchaſe the whole of a voluminous compilation as a ſubſtitute for a ſhort treatiſe on any particular art or ſcience. There could be here no intention whatever to pirate the plaintiff's work, any more than if the defendant had publiſhed a few extracts from it in criticiſing it in a Review.—With reſpect to the three prints, ſuppoſing that they were copied from the plaintiff's, there was a preliminary objection in point of law to his recovering. His name was not engraved upon them. It was only the ſtatute that reſted a property in prints in the publiſher; and that, as a condition, required his name to appear upon them. The plaintiff therefore had no legal remedy under the ſtatute, having neglected to comply with the conditions preſcribed by it (*a*). —But farther, notwithſtanding the reſemblance of the two ſets of plates, the one could not be conſidered as copies of the others, ſince each *guard* in fencing was ſuch a poſitively defined poſition, that the attitudes of men practiſing it muſt neceſſarily be the ſame; nor could theſe prints be ſuch as were meant to be

(*a*) The ſtat. 8 G. 2. c. 13. §. 1. veſts the property of certain prints in the inventors' deſigners, &c. for 14 years from the day of publiſhing, "which ſhall be truly engraved, *with the name of the proprietor*, on each plate, and printed on every ſuch print;" and inflicts on other perſons printing the ſame without the conſent of the proprietor, the penalty of forfeiting the plate, the ſheets on which the prints are copied, together with 5*s*. for every print, &c. The 7 G. 3. c. 38. extends to prints taken from any pictures, models, &c. and enlarges the right to 28 years, without requiring any name to appear on the print; and the 17 Geo. 3. c. 57. gives a ſpecial action on the caſe to recover damages; which appears to have been *ex abundanti cautelâ*.

protected by the ſtatute; as they were merely acceſſary to the letter-preſs, like the diagrams in Euclid.

Lord ELLENBOROUGH.—This action is brought for prejudice to a work veſted in the plaintiff; and the queſtion is, whether the defendant's publication would ſerve as a ſubſtitute for it? A Review will not in general ſerve as a ſubſtitute for the book reviewed; and even there, if ſo much is extracted that it communicates the ſame knowledge with the original work, it is an actionable violation of literary property. The intention to pirate is not neceſſary in an action of this ſort; it is enough that the publication complained of is in ſubſtance a copy, whereby a work veſted in another is prejudiced. A compilation of this kind may differ from a treatiſe publiſhed by itſelf; but there muſt be certain limits fixed to its tranſcripts; it muſt not be allowed to ſweep up all modern works; or an Encyclopædia would be a *recipe* for completely breaking down literary property. Here 75 pages have been tranſcribed out of 118, and that which the plaintiff ſold for *half a guinea* may be bought of the defendant for *eightpence*.—As to the prints, the queſtion will be, whether the defendant has copied the main deſign? Although the plaintiff's name is not engraved upon them, if there has been a piracy, I think the plaintiff is entitled to a verdict on the two laſt counts of the declaration. The intereſt being veſted, the common law gives the remedy. I have always acted on the caſe of Beckford *v.* Hood (*a*); in which the court of

(*a*) 7 T. R. 620.

King's

King's Bench held, that an author, whoſe work is pirated, may maintain an action on the caſe for damages, although the work was not entered at Stationers Hall, and although it was firſt publiſhed without the name of the author affixed.—But it is ſtill to be conſidered whether there be ſuch a ſimilitude and conformity between the prints, that the perſon who executed the one ſet muſt have uſed the others as a model. In that caſe he is a copyiſt of the main deſign. But if the ſimilitude can be ſuppoſed to have ariſen from accident; or neceſſarily, from the nature of the ſubject; or from the artiſt having ſketched deſigns merely from reading the letter-preſs of the plaintiff's work,—the defendant is not anſwerable. It is remarkable however, that he has given no evidence to explain the ſimilitude or to repel the preſumption which that neceſſarily cauſes.—His lordſhip ſaid he would ſave the point as to the directions of the ſtatute not being complied with; and therefore directed the jury to find ſeparate damages for the letter-preſs and the prints.

The plaintiff had a verdict, with 70 *l.* for the former, and 30 *l.* for the latter.

Garrow, *Scarlet*, and *Comyn*, for the plaintiff.

The *Attorney General*, *Richardſon*, and *Gabbel*, for the defendant.

[Attornies, *Searle* and *Bicknell.*]

Vide ſtat. 8 Ann, c. 19. Donaldſon *v.* Becket, 7 Bro. P. C. 88.—Millar *v.* Taylor, 4 Burr. 1380.—Chapman *v.* Pickerſgill, 2 Wilſ. 145.—Tonſon *v.* Collins, 1 Blac. Rep. 330.—Thompſon *v.* Symonds, 5 T.R. 41.—Cary *v.* Longman, 1 Eaſt. 358.

Same day.

DUNCAN *v.* SCOTT.

In an action by the indorſee againſt the drawer of a bill of exchange, if it appears that the defendant drew the bill, without conſideration, and under dureſs; it is incumbent on the plaintiff to prove that he gave value for it, although it was indorſed to him before it became due.

ASSUMPSIT on a foreign bill of exchange, dated Cape François, St. Domingo, 4th December 1797, drawn by the defendant on J. and E. Gardhener, at Charleſton in North America, for 3,000 Spaniſh dollars, at 6 months after date, payable to V. Kein, and indorſed by him to the plaintiff.—Pleas, *non aſſumpſit*, and the ſtatute of limitations.—Replication to the laſt plea, that plaintiff had been out of the realm from the time of the cauſe of action accruing.

Evidence being given of the defendant's handwriting, and of the bill having been regularly proteſted for non-payment by the plaintiff, a witneſs was called, who ſwore that it was afterwards ſhewn to the defendant, with the indorſement upon it, and that he then ſaid, he knew the bill had not been paid; he had given notice to the drawees not to pay, as he had received no value for it; being maſter of an American ſhip, he was carried into Cape François, in St. Domingo, in the year 1797; there he was thrown into priſon, and threatened with having his ſhip confiſcated, and being himſelf guillotined, if he did not put his name to the bill; the object of it was, to enable V. Kein to diſcharge any farther dues that might be exacted in reſpect of his ſhip, when he had left the iſland; but V. Kein had afterwards written him, that no farther dues were exacted, and that he would therefore be ſubject to no demand as drawer of

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the bill. It appeared that the plaintiff, from 1797, had been reſident at Baltimore in America.—The *Attorney General* at firſt reſting the plaintiff's caſe here,

Topping for the defendant objected, that there was no proof of the indorſement of V. Kein the payee.

The *Attorney General* contended, that the neceſſity for this was waived by the defendant, when he was ſhewn the bill, having objected to paying, only on the ſcore of having had no conſideration for it.

Although a bill of exchange has been ſhewn to the drawer, with the name of the payee indorſed upon it, and he merely objects to paying it, that he had drawn it without conſideration; in an action againſt him by the indorſee, this does not diſpenſe with regular proof of the indorſement.

Lord ELLENBOROUGH.—It does not appear that upon that occaſion there was any converſation concerning the indorſement; and his ſilence cannot be conſidered a ſufficient admiſſion of the hand-writing of the indorſer (*a*).

The *Attorney General* then undertook to prove this by the depoſition of one Gordon, the mate of an American ſhip, who being about to leave this country in Auguſt laſt, had been examined upon interrogatories at the Chief Juſtice's chambers. Accordingly, a copy of the depoſition, which had been received from Mr. Platt, clerk to the Chief Juſtice, and ſigned by his lordſhip himſelf, was put in as evidence.

A copy of depoſitions ſworn at a Judge's chambers, delivered out by his clerk, and atteſted by his ſignature, is admiſſible evidence, without proof of its having been examined with the original.

Topping objected, that either the original depoſition, or an examined copy of it, ſhould be produced; as there was no evidence that this paper contained what had been ſworn by the witneſs.

(*a*) Smith *v.* Cheſter, 1 T. R. 654.

Lord ELLENBOROUGH.—It appears to have been delivered out in the courſe of office; and *primâ facie* it muſt be taken to be correct. If it is ſuſpected, that ſome one perſonated Gordon, and that his ſignature is a forgery, I will ſend to chambers for the original examination. Otherwiſe, the copy ſo atteſted and delivered muſt be received and relied on. This is like the office copy of a rule, which, when received in the uſual courſe of office, does not require to be proved as an examined copy. The Chief Juſtice's clerk makes copies of theſe depoſitions, as the clerk of of the rules, or his deputy, does of the rules of court (*a*).

The depoſition was then read, and proved the handwriting of V. Kein to the bill. Upon which,

Topping contended, that the plaintiff muſt ſtill be nonſuited, as he had not proved himſelf to be holder of the bill for a valuable conſideration. The bill had been drawn by the defendant, when he was under imprifonment; when he was threatened with death and the confiſcation of his property; when he was not a free agent, but a mere inſtrument in the hands of others. He was clearly not liable upon it to thoſe who had extorted it from him; and if it was binding upon him at all, if it was not a complete nullity, it was at leaſt incumbent on thoſe who ſued as indorſees of a bill made under ſuch circumſtances, to ſhew how

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(*a*) Selby *v.* Harris, Ld. Doug. 56. Bul. N. P. 229. Raym. 745. Kinnerſley *v.* Orpe, Gilb. Law Ev. 24.

they

they came by it; that they are innocent holders, and that they gave full value for it to the indorſer.

The *Attorney General* maintained, that as the proteſt proved the bill to have been in the hands of the plaintiff before it became due, it was unneceſſary for him to ſhew, in the firſt inſtance, what conſideration he had given for it, and that it lay on the other ſide to impeach his title. Had the indorſement taken place after the bill was due, the caſe would have been otherwiſe, as the bill would then have come to the plaintiff under circumſtances of ſuſpicion; but before a bill is due, full credit is to be given to it, and every one has a right to ſuppoſe, that the perſons whoſe names appear upon it became parties to it regularly and for a full conſideration. Under theſe circumſtances, it was to be preſumed, that the indorſee gave value for the bill; and the *onus probandi* lay upon the drawer, if he did not. There was no doubt, that the plaintiff here had received the bill in payment of goods ſold; but he could not anticipate the defence to be ſet up to the action; and it would materially ſhake the credit of negotiable ſecurities, if in every caſe the plaintiff muſt come prepared at the trial to prove what valuable conſideration he gave for them.

Lord ELLENBOROUGH held, that the defendant not having been a free agent when he drew the bill, it was incumbent on the plaintiff to give ſome evidence of conſideration; and therefore directed a *nonſuit*.

The *Attorney General* and *Scarlett* for the plaintiff.

Topping and *Holroyd* for the defendant.

[Attornies, *Weſtons* and *Maddowcroft*]

Vide Lord C. J. EYRE's judgment in Collins *v.* Martin, 1 Boſ. & Pul. 648. Lawſon *v.* Weſton, 4 Eſp. Caſ. 56. Miller *v.* Race, 1 Bur. 452. Peacock *v.* Rhodes, 633. Grant *v.* Vaughan, 3 Burr. 1516. Smith *v.* Knox, 3 Eſp. Caſ. 46.

Friday, Dec. 18.

CUMING *v.* BROWN.

The bona fide indorſee of a bill of lading, for value, and without notice of the inſolvency of the conſignee, or of any other circumſtance which in fairneſs ſhould preclude him from taking the indorſement, has an abſolute right to the goods; although he knew that the conſignor had not been paid for them in caſh.

TROVER for 35 pipes of Madeira wine, and 20 pipes of brandy.

The wines and brandies in queſtion were conſigned by Philip Jean, a merchant at Jerſey, to Edward Main, in London, and were ſhipped on board the Britannia, of which the defendant was maſter. The plaintiff claimed as aſſignee of the bill of lading; whereby they were to be delivered "unto Edward Main, or to his aſſigns, he or they paying freight, &c."

The ſale to Main appeared to have taken place in the end of 1806; and on the 20th of December in that year, Jean drew a bill on him for 538*l.* at 3 months, on account of the brandies, which he accepted.

cepted. In February 1807, the goods were ſhipped, and on the 17th of that month, Jean forwarded a bill of lading to Main. This arrived in London on the 23d, and the ſame day was indorſed to the plaintiff. On the 7th of March, Jean drew two bills on Main, for 1,010*l.* at 6 months, on account of the wines, which were alſo accepted. But both theſe and the former bill of exchange were diſhonoured when due; Main having become inſolvent, and abſconded from his creditors. On the ſhip's arrival here, the plaintiff demanded the goods from the defendant, under the bill of lading, and tendered him freight for them; but he had previouſly delivered them to Meſſrs. Abel and Co., who had a power of attorney from Jean, to ſtop them *in tranſitu*.

When the preſent action was brought, a bill in equity was filed againſt the plaintiff, for a diſcovery of the conſideration he had given for the bill of lading; in his anſwer to which he ſwears, that at the time of the indorſement, Main was indebted to him in 499*l.* for goods ſold, and that he then accepted bills in favour of Main, for ſums amounting, together with the 499*l.* nearly to the value of the wines and brandies,—all which bills he has ſince duly ſatisfied. He adds, " and this deponent underſtood and believed at that time, that the ſaid 35 pipes of Madeira and 20 pipes of brandy had been ſold to, and purchaſed by, the ſaid Edward Main, in the courſe of trade; *and although this deponent was aware that they had not been actually paid for by the ſaid Edward Main, or by any other perſon, to this deponent's knowledge,* yet

yet he concluded, that the ſame would be paid for, or credit given to the ſaid Philip Jean by the ſaid Edward Main, in the courſe of their buſineſs together."

The *Attorney General* contended, that under theſe circumſtances the plaintiff muſt be nonſuited. It had been decided in Lickbarrow *v.* Maſon (*a*), that if the conſignee indorſes the bill of lading for a valuable conſideration to a *bonâ fide* holder, *without notice*, the aſſignee is entitled to the goods, and the conſignor is deprived of the power he would otherwiſe have had, to ſtop them *in tranſitu*. The queſtion here therefore was, whether the plaintiff was indorſee, for a valuable conſideration,—without notice—that the goods had not been paid for by the conſignee? The only reaſon why the *bonâ fide* indorſee, without notice, was placed in a better ſituation than the conſignee, was, that he might have reaſon to ſuppoſe, that the goods were paid for, and might thus fairly believe, that by his purchaſing them, no one could be prejudiced; but he never could form any ſuch notions, if he knew that the conſignor remained unpaid, and in that caſe, he could be in no better condition than the conſignee, againſt whom the right to ſtop *in tranſitu* was not diſputed. At the time of the indorſement here, there had not even been a bill drawn for the wines, and the bill for the brandies, although running, was mere waſte paper. The plaintiff himſelf had expreſsly acknowledged, he he was aware the goods had not been paid for by Main, or by any other perſon.

(*a*) 2 T. R. 63.

Park

Park for the plaintiff maintained, that by *notice* in theſe caſes muſt be underſtood *notice of the conſignee's inſolvency*, or of ſome colluſion practiſed againſt the rights of the conſignor. If the oppoſite doctrine were law, the diſcuſſions in Lickbarrow *v.* Maſon and the other caſes had been wholly nugatory; for it would have been enough to ſhew (which could eaſily have been done) that the indorſees knew the conſignors had not actually received payment. Theſe caſes would be completely overturned; for in fact, goods never are paid for before the arrival of the bill of lading, except by bills of exchange. The plaintiff here knew there was one bill running as payment of the goods; and as Main was at that time in perfectly good credit, there was no notice to the plaintiff of any thing which could defeat his claim.

Lord ELLENBOROUGH.—The effect of the indorſement of a bill of lading, where the indorſee is holder for value, and without notice of any circumſtance to prevent him from *bonâ fide* accepting of it, is to veſt in him an uncountermandable authority to receive the goods. The bill of lading does not paſs the property, but the right to the poſſeſſion of it. We have to ſee then, whether this indorſement be *bonâ fide*,—for a valuable conſideration,—and without notice of any circumſtance which ſhould have induced the plaintiff to decline being concerned in the tranſaction.—On the 20th December 1806, Jean draws a bill for 538*l.* on account of the brandies, which is accepted by Main. This was running at the time of the indorſement. I ſhould have great difficulty in ſaying, that, under theſe circumſtances, an indorſement of the bill

of

of lading for a valuable conſideration was a nullity. I ſhould ſhake the ſecurity of mercantile tranſactions, were I to decide that no right paſſes to the indorſee, unleſs the conſignor has been previouſly paid for the goods in monies numbered. The conſignee had here given a negotiable obligation to pay. This was a valuable conſideration, though not ſtrictly a payment. When the plaintiff ſays in his anſwer, that he was aware the goods were not paid for, he only means he knew the bills were not then actually ſatisfied. If he knew that Main's acceptances were mere moonſhine, then he could not lawfully intervene, to bar the conſignor's right of ſtopping *in tranſitu*. But he had notice of nothing to preclude him from taking the indorſement, if ignorant of Main's impending inſolvency, he only knew that, inſtead of a caſh payment, bills, which were then running, had been accepted for the value of the goods. His Lordſhip concluded, by leaving three queſtions to the Jury: 1ſt, Was the tranſaction *bonâ fide*, and not with intent to defraud the conſignor? 2dly, Did the plaintiff give a valuable conſideration for the indorſement of the bill of lading, both as to the wines and the brandies? 3dly, Had he notice of any circumſtance to preclude him from accepting of the indorſement?

The indorſee of a bill of lading, in trover for the goods, is only entitled to recover the amount of his advances upon them.

The Jury having found a verdict for the plaintiff, Lord ELLENBOROUGH ſaid, he was entitled to damages only to the amount of the ſums he had advanced. In ſtrictneſs, trover was ſubſtituted for detinue, by which the plaintiff got poſſeſſion of the goods themſelves; but if the plaintiff here were in poſſeſſion of the goods, he would be anſwerable for the ſurplus

beyond the amount of his advances; and it would, therefore, be idle to give him a verdict for the whole value of the goods, as he would afterwards be obliged to refund.—It was then agreed that the damages ſhould be ſettled out of court, upon this principle.

Park, *Taddy*, and *Bolland*, for the plaintiff.

The *Attorney General* and *Paley* for the defendant.

[Attornies *Palmer* & Co. and *Crowder* & Co.]

Vide Haille *v.* Smith 1 B. and P. 564.—Walley *v.* Montgomery, 3 Eaſt. 585.—Coxe *v.* Harden, 4 Eaſt. 211.—Salomons *v.* Niſſen, 2 T. R. 674.—Newſom *v.* Thornton, 6 Eaſt. 17.—Lickbarrow *v* Maſon, 2 T. R. 63. 1 H. Bl. 357. 2 H. Bl. 211. 5 T. R. 367. 6 Eaſt. 20. n. S. C.

KYMER AND OTHERS *v.* SUWERCROPP. Same day.

ASSUMPSIT for goods ſold and delivered, and for goods bargained and ſold.—Plea, the general iſſue.

If goods are bought by a broker, the principal is liable to the vendor, if called upon when payment becomes due; although he has previouſly paid the price of the goods to the broker.—*Secus*, if the day of payment is allowed to paſs by, without any demand being made upon the principal. Although goods are ſtopped *in tranſitu*, the

On the 10th, 17th, and 24th days of June laſt, and on the 1ſt day of July, the plaintiffs ſold by public auction to Meſſrs Kenyon and Co. coffees to the value of about 1100*l.* By the conditions of ſale, the goods were to be paid for on delivery, and were to be weighed and taken away within one month from the day of ſale. Theſe coffees were bought by Kenyon and Co. as brokers for the defendant; which was not known to the plaintiffs till the 8th of July, on which day

vendor, after the credit has expired, may recover for them, under a count for goods bargained and ſold, if he was ready to deliver them on the price being paid.

day Kenyon and Co. became inſolvent. A great part of the coffee had previouſly come to the defendant's hands, the warrants for the delivery of it from the Weſt India Docks, having been given him by Kenyon and Co., who had received them from the plaintiffs. For ſo much he paid Kenyon and Co. by accepting a bill, dated 15th June, drawn by them upon him, for 751*l.* at one month after date, which was ſatisfied when it became due. The reſidue of the coffee was ſtopped by the plaintiffs *in tranſitu*. However, at the expiration of one month from the different ſales reſpectively, (called the days of *prompt*), they ſent a clerk to demand payment of the defendant. The clerk on one of theſe occaſions offered, on being paid, to give him the remaining warrants, although he had them not at that time about him; but the defendant refuſed to pay, ſaying, he was adviſed by his attorney he was not liable

Park now contended, that the action could not be ſupported, either for one parcel of coffee or for the other. As to the firſt he argued, that, though in general upon a ſale to a broker, the vendor may come upon the principal when diſcovered; the doctrine muſt be taken with this qualification, that the principal has not previouſly paid the price of the goods to his broker. But, it would be a monſtrous injuſtice to permit the vendor, after giving credit to the broker alone, and after lying by till the latter receives the money from the principal, to reſort to the principal who has already paid. Here the defendant would have been liable to the plaintiffs to a certain extent, had they intervened in time; but it was too late, after

inducing him to pay to the perſon who had bought the goods for him, under the idea, that they were ſatisfied with the ſolvency of the broker, and did not look beyond *him*.—As to that part of the coffee which had been ſtopped *in tranſitu*, the plaintiffs could not recover the value of it, either under the count for goods ſold and delivered, as it had not been delivered, or under the count for goods bargained and ſold, as the warrants had not been regularly tendered to the defendant. To render this bargain and ſale binding on him, it was incumbent on the plaintiffs to enable him to enjoy the benefit of it; but in fact, the goods had been completely withheld from him, and the contract had been thereby reſcinded.

The *Attorney General* on the other ſide, inſiſted that this caſe could not be diſtinguiſhed from Waring *v.* Favenck (*a*). The goods being ſold to be paid for at certain days, the plaintiffs had no concern with any tranſactions between the parties till thoſe days arrived. It might be an act of kindneſs in the defendant, to give this acceptance to Kenyon and Co. on the 15th of June; but if it was a payment for the coffees, it was a payment in his own wrong. If the day of prompt had been ſuffered to paſs by without any demand being made on the defendant, the caſe would have been altered; but to hold him diſcharged under the actual circumſtances, would be to allow a ſet-off between him and his own broker.—The defendant's refuſal to pay for the goods ſtopped *in tranſitu* diſpenſed with a tender of the warrants.

(*a*) *Ante* 85.

Lord

Lord ELLENBOROUGH.—A perſon ſelling goods is not confined to the credit of a broker who buys them but may reſort to the principal on whoſe account they are bought; and he is no more affected by the ſtate of accounts between the two, than I ſhould be, were I to deliver goods to a man's ſervant purſuant to his order, by the conſideration of whether the ſervant was indebted to the maſter, or the maſter to the ſervant. If he lets the day of payment go by, he may lead the principal into a ſuppoſition, that he relies ſolely on the broker; and if in that caſe the price of the goods has been paid to the broker, on account of this deception, the principal ſhall be diſcharged. But here payment was demanded of the defendant on the ſeveral days it became due, and no reaſon was given him to believe that his broker alone was truſted. He has received a great part of the coffee, and enjoyed the benefit of it; the right of the vendors is entire, unleſs he has paid them, or ſome perſon authorized by them to receive payment; Kenyon and Co. had no ſuch authority; therefore he is ſtill liable.—The reſt of the coffee was ſtopped, only to prevent its getting into the hands of the inſolvent brokers; and as payment was to precede the delivery, it was enough if the plaintiffs, on being paid, were ready to have delivered it.

Verdict for the plaintiffs.

The *Attorney General* and *Bolland* for the plaintiffs.

Park and *Scarlett* for the defendant.

[Attornies, *Crowder & Co.* and *Searle.*]

HIBBERT

HIBBERT *v.* SHEE AND ANOTHER.

Saturday, Dec. 19.

In the ſale of goods by ſample, if the bulk does not accord with the ſample, the purchaſer is not bound to accept or pay for the goods, on any terms; although no fraud was intended on the part of the vendor, and although the cuſtom may have been that, under ſuch circumſtances, the bargain ſhall ſtand good, upon an allowance being made for the inferiority.

ASSUMPSIT for goods bargained and ſold.—Plea, the general iſſue.

At a public ſale, on the 9th of April laſt, the defendants purchaſed of the plaintiff, by ſample, ſixteen hogſheads of ſugar, at eighty ſhillings per cwt. On examining the ſugars purchaſed, it was found that they by no means correſponded in colour with the ſamples; and in the opinion of the brokers who then ſaw them, they were leſs valuable by five or ſix ſhillings a hundred weight. The plaintiff, nevertheleſs, required that the defendants ſhould take the ſugars, on being allowed a compenſation for the inferiority; inſiſting that, according to the uſage of the trade, where ſamples have been drawn without fraud, and the bulk notwithſtanding proves inferior, ſworn brokers are to be called in to eſtimate the difference, and the vendor making an allowance for this, the purchaſer muſt ſtand to his bargain.—The defendants refuſed to accede to this propoſal; as they alleged the ſugars were unfit for the purpoſe for which they had bought them.

It appeared that the hogſheads of ſugar in queſtion arrived in the Weſt India docks in the end of November 1806, and that in purſuance of the dock act, as they were landed, ſamples were taken, which were the ſamples exhibited at the ſale on the 9th of April following. From being expoſed to the air during this long interval, they had become much whiter than

when originally taken, or than freſh ſamples drawn on the 11th of April; although the latter, on being produced to the jury, now appeared nearly of the ſame hue. The witneſſes ſtated, that both were of equal grain, and likely to contain the ſame quantity of ſaccarine matter, ſo that at the time of the ſale they would have been of equal value to the ſugar baker; but that for retail much more depends upon the colour than the quality.—The act of parliament enables the importer of ſugars at any time to obtain freſh ſamples; while the purchaſer at a public ſale has no means of knowing when the ſamples exhibited have been drawn.

The plaintiff's counſel reſted their caſe chiefly on the uſage; which, they contended, muſt govern and explain the contract between the parties. In ſupport of it, ſeveral brokers of great experience were examined, who ſwore, that making an allowance for the difference was the common mode of ſettling diſputes of this kind; although they had known a few inſtances where, by conſent, the ſugars had been returned to the vendor.

Lord ELLENBOROUGH.—The queſtion here is, whether the contract has been ſubſtantially performed. Does the ſugar accord with the ſample exhibited at the ſale? If I buy a commodity wholly diſcordant to that which is promiſed me, I am not bound to accept of a compenſation for the diſſimilarity. This is not a performance of the contract. And though there ſhould prevail an habitual mode of arrangement between dealers in the article, I have always a right to ſay, "is this what I meant to purchaſe?" A ſpirit of candor

candor and accommodation may lead to a compromiſe between the parties; but the legal mode of dealing is, that, if the article agreed on is not furniſhed, I may reject it and keep my money in my pocket.—It appears, that with reſpect to ſugars, there will be a difference between the bulk and the ſample, where the ſample has been for ſome time expoſed to the air; and if the party had full notice when the ſample was drawn, he might be expected to calculate upon the difference; but all that is communicated at theſe ſales is, that the ſugars of which ſamples are produced lie in the Docks, and the bidders have a right to preſume that the ſamples have been recently drawn. Did the ſugar in queſtion then accord in quality with the ſample, and was it fit for the purpoſes in the contemplation of the purchaſers?

Verdict for the defendants (*a*).

The *Attorney General*, *Garrow*, and *A. Moore*, for the plaintiff.

Park and *Marryat* for the defendant.

[Attornies, *Winter* & Co. and *Rivington*.]

(*a*) The principle of this caſe has been applied to many other contracts. Thus, in inſurance, a material concealment, even from accident, negligence, inadvertency or miſtake, is fatal to the policy; nor can the aſſured, by tendering any increaſe of premium, require the underwriters to confirm it. The riſk is not that bargained for.—Carter v. Boehm, 3 Burr. 1909.—Ratcliffe v. Shoolbred, Park, 181. Marſhall 349.—Emerig t. 1. p. 20.

Same day.

BECKWITH AND OTHERS *v.* SYDEBOTHA

If the owner of a ship receives a letter from the captain, written on her arrival in a foreign port, giving such an account of her as to render it probable that she must remain there for the purpose of being repaired, beyond the time that would be necessary for her to take in her cargo; this letter need not be communicated to the underwriters, in effecting a policy of insurance upon her, at and from the foreign port to a port in England; unless information on the subject be particularly called for.

ASSUMPSIT on a policy of insurance, on th Earl of Wycombe and her cargo, at and Pictou in Nova Scotia to Liverpool.

The ship having arrived at Pictou on the 1 May 1803, sailed on her homeward-bound voy the 2d of September; but meeting with stormy w was obliged to put into Halifax on the 9th of O so disabled as to be unfit to prosecute the voyag policy was executed on the 19th of June.

The first defence set up by the underwrite that the ship when she sailed from Pictou was r worthy. To make out this, the deposition wa of a man who had surveyed her on her arr Halifax, and who spoke to a great many defic which he had discovered in her.

The *Attorney General* for the defendant th posed to call several eminent surveyors of ship had never seen the Earl of Wycombe, and to by their evidence, that a ship in the state in wh was sworn to have been on the 12th of Octo Halifax, could not have been seaworthy on the September at Pictou.

G

Garrow for the plaintiff objected that this was an inference which it was for the jury to draw, if the facts would warrant it; and pointed out the prejudice that might arise from asking the opinion of a witness on a statement, which might be false, and was at any rate *ex parte*. But,

Lord ELLENBOROUGH held that this was like examining a physician or surgeon to say, whether upon such and such symptoms, a person whose life was insured could at the time of the insurance have been in a good state of health. Where there was a matter of skill or science to be decided, the jury might be assisted by the opinion of those peculiarly acquainted with it from their professions or pursuits. As the truth of the facts stated to them was not certainly known, their opinion might not go for much; but still it was admissible evidence. The prejudice alluded to might be removed by asking them in cross-examination, what they should think upon the statement of facts contended for on the other side.

Upon a question concerning the seaworthiness of a ship, after the evidence of persons who have examined her condition, experienced shipwrights who never saw her may be called, to say whether, upon the facts sworn to, she was in their opinion seaworthy or not.

The witnesses were then examined (*a*); but did not give any very decided opinion.

The *Attorney General* next insisted, that at the time of effecting the policy there had not been a proper disclosure to the underwriters. Immediately before this, a letter had been received from the captain of the ship, dated at Pictou, on the 11th of May; in which he

(*a*) Peak. Law. Ev. 190, 191.—

ſtates the damages he had encountered on the outward-bound voyage, and deſcribes the ſhip as being then unſeaworthy, and ſtanding in need of a great many repairs. The *Attorney General* allowed that after the deciſion in Hayward *v.* Rogers (*a*), whatever forms an ingredient in ſeaworthineſs need not be diſcloſed by the aſſured to the underwriter, unleſs information on the ſubject is particularly called for; as an aſſured impliedly warrants the ſhip to be ſeaworthy. But ſtill there muſt be a diſcloſure of every circumſtance which will increaſe the riſk; and if the contents of this letter ſhewed the riſk to be greater than the underwriters might otherwiſe have reaſonably ſuppoſed, then it ought to have been communicated to them, for the purpoſe of enabling them to apportion the premium, although not for the purpoſe of informing them as to the ſeaworthineſs of the veſſel. But it was clear that from the very diſabled ſtate in which the Earl of Wycombe was deſcribed to have been on her arrival at Pictou, ſhe muſt be detained there to be repaired much longer than would be neceſſary to take in her cargo, even if ſhe ſhould at laſt ſail in a ſtate of complete equipment; and that the riſk which the underwriters were led to conſider as a ſummer riſk, would be turned into a winter one, which was much more dangerous, and from which the loſs had actually happened.

The letter was given in evidence, and it was allowed that it had not been communicated when the policy was effected.

(*a*) 4 Eaſt. 590.

Lord

Lord ELLENBOROUGH upon this part of the caſe ſaid, that if it was neceſſary to have diſcloſed this letter as governing the time when the ſhip would ſail, it would in all caſes be neceſſary to inform the underwriters where any repairs were wanting; and he believed it very frequently happened, that a ſhip muſt have ſomething done to her before ſhe would ſail on her homeward-bound voyage. If the underwriters wiſhed to have particular information upon this ſubject, they ought to aſk for it; and if they were diſpoſed only to inſure a voyage made during a particular ſeaſon of the year, they ſhould (as was commonly done with Jamaica ſhips) inſert a warranty in the policy, that the ſhip ſhall ſail on or before a certain day. He therefore thought the communication of the captain's letter as little neceſſary, to ſhew the probable ſtay of the ſhip at Pictou, as to ſhew whether ſhe was ſeaworthy before the commencement of the voyage.

The plaintiffs had a verdict.

Garrow, *Park*, and *Clarke* for the plaintiffs.

The *Attorney General* and *Holroyd* for the defendant.

[Attornies, *Windle* and *M'Dougall.*]

Carter v. Bohem 3 Burr. 1905. *H.T.* 1782, Park, 229.—Marſh. —Shoolbred v. Nutt. *Sitt. after* book I. c. 10.

Same day.

WAITHMAN AND ANOTHER *v.* WAKEFIELD, ESQ.

Although a husband is not cohabiting with his wife, yet if she improvidently takes up goods of a tradesman, for which he would not otherwise be liable, he assents to the contract, if having any controul over the goods, he does not cause them to be returned to the vendor.—A husband is liable for necessaries furnished to his wife suitable to the appearance in life he permits her to assume, though greatly beyond his degree or his circumstances.—But if a tradesman trusts a married woman, deceived by the false appearance she assumes, when by cautious enquiries he might have ascertained her real situation, he cannot come upon the husband beyond the extent to which these enquiries would have shewn him to be responsible.

ASSUMPSIT for goods sold and delivered.—Plea, the general issue.

The plaintiffs are linen drapers in Fleet-street, and brought this action against Mr. Wakefield, a barrister at law, to recover the sum of 34 *l.* 13 *s.* being the value of certain articles of dress supplied to his wife.

The goods in question were furnished in the end of December 1805, at a time when the defendant did not cohabit with his wife, but occasionally saw her. When she ordered them of the plaintiffs, she called at their shop, attended by a man dressed as a livery servant, and talked of her husband having just taken a new house, which he was about to fit up in a stile of elegance. She herself was then living in furnished lodgings, having without his knowledge removed from a boarding house in which he had placed her. Soon after she had the things, a clerk of the plaintiffs called upon her, and insisted upon either having them back again, or being immediately paid for them. Upon this occasion the defendant was present, and he wished that all the articles should be returned; but Mrs. Wakefield using very violent language refused to give up any part of them.—They consisted of materials for making up eight or ten fashionable dresses.

The defence was, that these goods were neither necessaries, nor suitable to the circumstances of the defendant; and that therefore, as he was not living with his wife when they were supplied to her, he was not

not liable for them. In ſupport of this, it appeared that ſhortly before, ſhe had a well-furniſhed wardrobe for a lady in the middling rank of life, which the judge held the jury might preſume to have been given her by her huſband; and that his whole income amounted to one hundred pounds a year, allowed him by his brother.

Lord ELLENBOROUGH.—Where a huſband is living in the ſame houſe with his wife, he is liable to any extent for goods which he permits her to receive there; ſhe is conſidered as his agent, and the law implies a promiſe on his part to pay the value. If they are not cohabiting, then he is in general, only liable for ſuch neceſſaries as from his ſituation in life it his duty to ſupply to her. But even where they are parted, if the huſband has any controul over goods improvidently ordered by the wife, ſo as to have it in his power to return them to the vendor, and he does not return them, or cauſe them to be returned, he adopts her act, and renders himſelf anſwerable. Nor is it any excuſe in law, that the wife is unmanageable and diſobedient; as he muſt be ſuppoſed to exerciſe his marital rights and to regulate her conduct. Therefore, if when the plaintiffs' clerk in this caſe required the goods to be delivered back, they had not been eloigned, but were at that moment in the houſe, it was the defendant's duty to have compelled the redelivery, and the plaintiffs are entitled to a verdict.—Again, however low a man's circumſtances may be, if he allows his wife to aſſume an appearance which he is unable to ſupport, he is anſwerable for the conſequences. When a tradeſman is thereby deceived,

the loſs muſt fall upon him who connived at the deception. Whatever may be the huſband's degree, he ſends his wife out into the world with a credit correſponding to the rank in life in which, by his ſanction, ſhe affects to be placed; and if the preſent defendant was at all privy to his wife's going about attended by a footman, and pretending to be in a ſtate of affluence, he may be liable to a greater extent than if he had confined her to a mode of life ſuitable to his narrow fortune.—However, it is the duty of tradeſmen to make enquiries before truſting a married woman who is a ſtranger to them; and the plaintiffs do not ſeem to have taken the pains they were bound to do, to aſcertain the defendant's reſponſibility. Therefore, as they have truſted his wife for want of information which might eaſily have been obtained, if they receive a verdict at all, their demand ſhould be reduced to the charge for neceſſaries ſuitable to the circumſtances of the defendant.

The jury notwithſtanding gave the plaintiffs a verdict for the full ſum of 34*l.* 13*s.*

Park and *Bolland* for the plaintiffs.

The *Attorney General*, *Garrow*, and *Marryat* for the defendant.

[Attornies, *Smith* and *Addis*.]

Vide Etherington *v.* Parrott, 1 Salk. 118.—Manby *v.* Scott, 1 Sid. 109.—Manwaring *v.* Sands, 2 Str. 706.—Bolton *v.* Prentice, 2 Stra. 1214.—Harris *v.* Morris, 4 Eſp. Caſ. 41.—Bul. N. P. 135.—Peak. Law Ev. 235, 6.

GORDON *v.* RIMMINGTON.

Monday, Dec. 21.

If the captain of a ship insured burns her, to prevent her from falling into the hands of the enemy, this is a loss by *fire* within the meaning of the policy.

THIS was an action on a policy of insurance on the plaintiff's commission and privileges as captain of the ship Reliance, from Bristol to the coast of Africa, during her stay and trade there, and from thence to all or any of the West India Islands. The declaration stated the loss to be by *fire*, in order to prevent the vessel and her cargo from falling into the hands of the king's enemies.

The Reliance sailed from Bristol on the 4th of May 1804, and arrived on the coast of Africa about the middle of June. On the 24th of that month, being then in the river Gambia, she was chased by a French privateer, of greatly superior strength. She tried to escape; but finding that the privateer rapidly gained upon her, the captain and crew discharged her guns down her hatchways, and having set her on fire in several places, rowed ashore in the long boat.

The facts were not disputed; and the only question was, whether this was a loss by fire and within the perils insured against?

Lord ELLENBOROUGH.—The case is new; but I am clearly of opinion, that the plaintiff is entitled to recover. *Fire* is expressly mentioned in the policy, as one of the perils against which the underwriters undertake to indemnify the assured; and if the ship is destroyed

ſtroyed by fire, it is of no conſequence whether this is occaſioned by a common accident, or by lightning, or by an act done in duty to the ſtate. Nor can it make any difference whether the ſhip is thus deſtroyed by third perſons, ſubjects of the king, or by the captain and crew acting with loyalty and good faith. Fire is ſtill the *cauſa cauſans*, and the loſs is covered by the policy.

Verdict for the defendant.

The *Attorney General* and *Dampier* for the plaintiff.

Garrow for the defendant.

[Attornies, *Sweet* and *Buſwell.*]

Although this point of inſurance law be new in England, it has long been decided in foreign countries that, as the maſter is juſtified in burning the ſhip under ſuch circumſtances, the inſurer is liable for the loſs. Pothier, h. t. n. 53. Valin, art. 26. h. t. So it has been held, that the inſurer is liable, if a ſhip is burnt, without any fault in the maſter, from an apprehenſion that ſhe has the plague on board, and to prevent the infection from ſpreading. Emerigon, tom. i. p. 434.

Same day.

CROCKFORD *v.* WINTER.

If money has been obtained by means of a fraud, an action for money had and received lies to recover it back; to which it is no anſwer, that the defendant is really entitled to the money, if his right to it depends upon a queſtion not of common law juriſdiction.

ASSUMPSIT for money had and received. Plea, the general iſſue.

On the 26th Nov. 1790, Ann Watſon made her laſt will; whereby "ſhe gave and bequeathed 500*l.* 3 *per cent.*

cent. conſolidated annuities to truſtees (of whom the plaintiff is the ſurvivor) in truſt, to pay the intereſt and dividends thereof unto her daughter Elizabeth Troup, wife of James Troup, during the term of her natural life; and the like ſum, in truſt, to pay the intereſt and dividends thereof unto Ann Winter, the teſtatrix's other daughter, wife of William Winter, during the term of her natural life; and upon this further truſt, that upon the deceaſe of each or either of them the ſaid Elizabeth Troup or Ann Winter, the ſaid truſtees ſhould ſell the ſaid 500*l.* ſo given to each of them for life, and pay and divide the ſame equally to and amongſt the ſeparate and reſpective children of the ſaid Elizabeth Troup and Ann Winter, ſhare and ſhare alike, as they ſhould ſeverally attain their reſpective ages of 21 years." The teſtatrix died ſoon after making her will.

In Auguſt 1804, Ann Winter having been ſome years dead, the defendant, her ſon, came to the Bank of England, and claimed, as being her only ſurviving child, and having attained the age of 21, to have the 500*l.* 3 *per cents.* transferred into his name. He was told, it was neceſſary to produce a certificate of the marriage of his mother with William Winter. A certificate was in the ſequel produced accordingly, purporting to be ſigned by the Rev. William Hague, and ſtating a marriage to have been celebrated by the Rev. John Hogarth, on the 11th day of March, 1782, at the chapel of All Saints, in Newcaſtle-upon-Tyne, between William Winter, of the pariſh of Chapton, in the county of Northumberland, and Ann

Watſon,

Watſon, ſpinſter, of the ſaid chapelry, in the preſence of Robert Longſtaff and Margaret Kilpatrick, atteſting witneſſes to the regiſter.

The Bank officers ſtill required an affidavit of the genuineneſs of this certificate; upon which, William Winter the father went before the Lord Mayor, and ſwore that he had ſeen it copied from the regiſter, and ſigned by Mr. Hague. A regular certificate of the defendant's baptiſm having been likewiſe furniſhed, the ſtock was transferred into his name, and he ſoon after ſold it for 284*l.* 7*s.* 6*d.* To recover this ſum, with intereſt, was the object of the preſent action.

On the part of the plaintiff it was proved, that the certificate of the marriage was a forgery. William Winter, the father, had obtained a certificate from the curate of All Saints, in Newcaſtle, regularly taken from the regiſter of that chapelry, of the very ſame tenor; except that the names of the parties ſtood "John Haſtings and Ann Wilſon." This he had copied with great nicety, ſubſtituting his own name, and that of Ann Watſon, his ſuppoſed wife.—The plaintiff's caſe being cloſed,

The *Attorney General*, for the defendant, allowing the above facts to be true, ſtill maintained that he ſhould entitle himſelf to a verdict. He ſhould prove, that notwithſtanding this forgery, a marriage had been regularly celebrated between William Winter and Ann Watſon, on the 11th day of March, 1782, at All Saints in Newcaſtle. This was actually the

marriage mentioned in the regiſter between John Haſtings and Ann Wilſon. The defendant's father and mother, for ſome family reaſons, had aſſumed theſe feigned names, and had been married under them; as would be ſworn by Margaret Kilpatrick, the ſurviving atteſting witneſs, and, if neceſſary, by William Winter himſelf. The latter, thinking that difficulties might ariſe at the Bank from the feigned names in the certificate, had copied it, inſerting the true ones; but this was entirely without the knowledge of the defendant, who therefore appearing to be legitimate, would be entitled to retain the legacy which he had received, and which he might at any time recover back, if the preſent action ſhould he held to be maintainable.

Lord ELLENBOROUGH.—Aſſuming that a regular marriage did take place, and can be eſtabliſhed, I ſtill think that there ought to be a verdict for the plaintiff. The queſtion as to the defendant's right to the legacy cannot properly be decided here, but muſt be left open to the ſpiritual court. By means of a falſe voucher, he diſpoſſeſſed the truſtee of money, which the latter had a right to hold, till the point was duly aſcertained, who was legally entitled to it. I will aſſume that the defendant was not privy to the fraud; but his father was his agent; and for the frauds of an agent, the principal is *civilly* liable. The plaintiff has a right to be replaced in the ſituation in which he ſtood before the fraud was practiſed upon him; leaving you to litigate the queſtion in the proper forum. Otherwiſe, by means of fraud, all ſorts of teſtamentary queſtions might be brought into the courts of common

mon law. If the parties were married, you have a good caſe in the eccleſiaſtical court; and perhaps a queſtion of ſome nicety may ariſe there, whether, they living as man and wife, and the teſtatrix conſidering the defendant as their legitimate ſon, he would or would not, either way, be entitled to the legacy. But theſe are queſtions *alieni fori*; and to diſcuſs them here, would be to permit the defendant to take advantage of the fraud of his agent.

The *Attorney General* urged, that this action for money had and received was an equitable action, in which ſubſtantial juſtice was to be done between the parties, according to their reſpective rights; and put the caſe of the obligee of a valid bond by means of a trick, getting payment of the bond from the executor of the obligor; under which circumſtances, he contended, no action would lie at the ſuit of the executor, to recover the money back.

Lord ELLENBOROUGH.—Equity here requires that the parties ſhould be replaced in their former ſituation. Whatever it might be with queſtions properly of common law juriſdiction, ſuch as belong to another tribunal cannot be thus entertained. I ought not to try any teſtamentary cauſe which does not ariſe before me incidentally. Therefore, although a marriage ſhould be proved, I will direct the jury, that this is no anſwer to the preſent action, and that he who obtains money by means of a forged voucher cannot retain it.

It

It was then agreed to go into evidence of the marriage,—for this purpoſe, that if the fact was made out to the ſatisfaction of the jury, the defendant ſhould be at liberty to move to ſet aſide the verdict for the plaintiff, and to enter a nonſuit. Accordingly, Mrs. Margaret Wood (late Margaret Kilpatrick) was called, and ſwore that ſhe was preſent at the marriage of William Winter and Ann Watſon, under feigned names, as above deſcribed, and that for ſome time after the marriage they had reſided in her houſe. She was corroborated by William Winter himſelf, who alledged as a reaſon for aſſuming a feigned name, that he was at the time tutor in a gentleman's family, who he apprehended would have turned him off, on learning that he was married.

However, there were various contradictions in the evidence of both the witneſſes; and the jury found that there had been *no marriage*.

The plaintiff had a verdict for the produce of the ſtock; but Lord Ellenborough would not allow intereſt, ſaying that the fraud did not take this caſe out of the rule he had formerly laid down.

Although money has been obtained fraudulently, intereſt will not be allowed upon it on that account, in an action of aſſumpſit to recover it back.

Garrow, *Park*, and *Taddy*, for the plaintiff.

The *Attorney General* and *Andrews* for the Defendant.

[Attornies, *Winter* & Co. and *Meymott*.]

Vide De Havilland *v.* Bowerbank, *ante*, 50.

Same day.

BENNETT *v.* FARNELL.

A bill of exchange made payable to a fictitious perſon or his order, is neither in effect payable to the order of the drawer, nor to bearer, but is completely void. However, if money paid by the holder of ſuch a bill, as the conſideration for its being indorſed to him, gets into the hands of the acceptor, it may be recovered back as money had and received.

THIS was an action againſt the defendant as acceptor of a bill of exchange for £ 500. dated 25th March 1805, at two months after date.

The firſt count of the declaration, in which the plaintiff claimed as indorſee, ſtated the bill to have been drawn by Robert Abney, payable to the order of the ſaid Robert, by the name and addition of George Abney, eſq. and after being accepted by the defendant, to have been indorſed by Robert Abney to the plaintiff. In the ſecond count the plaintiff claimed as bearer; and having ſet out the bill as drawn by Robert Abney, payable to George Abney, eſq. or order, and accepted by the defendant, it averred, "that when the ſaid laſt-mentioned bill of exchange "was made, there was no ſuch perſon as George "Abney, the ſuppoſed payee named in the bill; but "that the ſaid name of George Abney was merely fic-"titious; by reaſon whereof the ſum of money ſpecified "in the ſaid laſt-mentioned bill of exchange, became "and was payable to the bearer thereof, according to "the effect and meaning of the ſame bill;"—adding, that the plaintiff became bearer of the bill for a good and valuable conſideration. There was a third count, in the common form on a bill or note payable to bearer; with the uſual money counts.—Plea, the general iſſue.

Park

Park in opening the caſe for the plaintiff ſtated, that the bill was actually made payable on the face of it to George Abney. The drawer had once had a brother of that name; but he had been long dead. Therefore it was the ſame as if it had been drawn payable to a fictitious perſon; and although the indorſement was made by the drawer, Robert Abney, not by George Abney the ſuppoſed payee, yet under the circumſtances, that was quite ſufficient, as upon the authority of the caſes of Tatlock *v.* Harris (*a*), Vere *v.* Lewis (*b*), and Minet *v.* Gibſon (*c*), a bill payable to a fictitious perſon is payable to bearer. Thus it would be enough for the plaintiff to prove that he became bearer of this bill for a good and valuable conſideration. But it not only could be proved that he had become ſo, but letters from the defendant would be read acknowledging this, and praying for further time to pay the bill.

Garrow for the defendant ſaid, that a caſe almoſt the ſame with that now opened had been decided by Lord Ellenborough himſelf at the Sittings after Hillary Term 1805. He then read a note of the caſe of *Were and others* v. *Taylor*, which was nearly as follows: "Action on a bill of exchange payable to Watts or order. No ſuch perſon exiſted. *Erſkine* for the plaintiffs inſiſted, on the authority of Tatlock *v.* Harris, that this muſt be taken as payable to bearer. He ſtated

(*a*) 3 T. R. 174.
(*b*) 3 T. R. 182.
(*c*) 3 T. R. 481. 1 H. Bl. 569.

that the produce of the bill had come to the hands of the defendant. Lord Ellenborough ſaid that would be the beſt caſe to make for the plaintiffs: But he ſhould heſitate very much before he ſhould hold that this bill could be conſidered payable to bearer; the very form of the bill was contrary to ſuch a ſuppoſition, and the caſes on the ſubject had been much doubted.—Accordingly, the plaintiffs failing to ſhew that the produce of the bill had come to the uſe of the defendant, they were nonſuited."

Park ſaid he underſtood, that in the Court of Common Pleas an action was brought immediately after, on another bill of the ſame ſet and framed exactly in the ſame manner, in which the plaintiff was allowed to recover.

Lord ELLENBOROUGH.—Muſt not that have been under the count for money had and received?

Comyn, amicus curiæ, obſerved that he had been in the cauſe alluded to in the Common Pleas; and that his Lordſhip's conjecture was right; as they had there proved that the defendant had received money for the bill, which had been paid by the plaintiff in diſcounting it.

Lord ELLENBOROUGH.—I will admit any evidence of value having been received by the defendant. If Bennett's money has found its way to him, he ſhall not be allowed to retain it. In that caſe he has money drily in his hands belonging to another perſon; and it may be

e recovered from him as money had and received. But the bill being made payable to *George Abney or order*, the plaintiff cannot sue upon it, either as the mere bearer, or as indorsee of Robert Abney. Where a bill is payable to the order of a particular person, an order from this person must be shewn by any one who would make title to the bill.

Plaintiff nonsuited.

Park and *Holroyd* for the plaintiff.

Garrow and *Gurney* for the defendant.

[Attornies, *England* and *Adams*.]

Almost all the modern cases upon this question arose out of the bankruptcy of Livesay & Co. and Gibson & Co. who negotiated bills, with fictitious names upon them, to the amount of nearly *a million sterling a year*. The first case was Tatlock *v.* Harris, 3 T. R. 174. in which the court of K. B. held that the *bonâ fide* holder for a valuable consideration of a bill drawn payable to a fictitious person, and indorsed in that name by the drawer, might recover the amount of it in an action against the acceptor, for money paid or money had and received; upon the idea, that there was an appropriation of so much Money to be paid to the person who should become the holder of the bill. In Vere *v.* Lewis, 3 T. R. 182, decided the same day, the court held, there was no occasion to prove that the defendant had received any value for the bill; as the mere circumstance of his acceptance was sufficient evidence of this; and three of the judges *thought* the plaintiff might recover on a count which stated that the bill was drawn payable to *bearer*.— Minet *v.* Gibson, 3 T. R. 481. put this point directly in issue, and the unanimous opinion of the Court was, that where the circumstance of the payee being a fictitious person is known to the acceptor, the bill is in effect payable

payable to bearer. Soon after, the court of C. P. laid down the ſame doctrine in Collis *v.* Emet, 1 H. Bl. 313. This deciſion was acquieſced in; but Minet *v.* Gibſon was carried up to the Houſe of Lords, 1 H. Bl. 569. The opinions of the judges being then taken, Eyre, C. B. (p. 698.) and Heath, J. (p. 619), were for reverſing the judgement of the Court below, and Lord Thurlow, C. coincided with them, (p. 625), but the other judges thinking otherwiſe, judgement was affirmed. Parl. Caſ. 8vo. ii. 48. The laſt caſe upon the ſubj ed is Gibſon *v.* Hur Bl. 187. 288. which ca the Houſe of Peers u murrer to evidence which it was held, t action on a bill of againſt the acceptor, that he was aware of being fictitious, evid miſſible of the circum der which he had acce bills payable to fictitio *Vide* Tuft's caſe, L Law, 206.

Same day.

HERBERT *v.* CHAMPION.

An underwriter who, upon a full diſcloſure of facts, has ſigned his initials to an adjuſtment on the policy, without paying the loſs, is not precluded afterwards, in an action againſt him, from taking advantage of circumſtances, with which he had been made acquainted, before ſigning the adjuſtment.——

ASSUMPSIT on a policy of inſurance ſhip Ganges, to and from the Southern Fiſhery.

The ſhip ſailed from the Downs, under c the Fury ſloop of war, on 12th December 1 Portſmouth, and before her arrival there was by a French privateer. The defence was, tha from the captain, dated 5th December, ſtating was to ſail under convoy of the Fury, though on the 6th of that month, had not been comm to the underwritter before effecting the policy, w

not till the 12th or 13th of January; all the broker then ſaid, having been, that the ſhip had ſailed about three weeks. This letter, it was contended, would have induced them to make inquiries whether the Ganges had reached Portſmouth, and would have ſhewn her to be a miſſing ſhip.

Qu. as to the effect of an adjuſtment when declared on ſpecially?

To this, two anſwers were given on the other ſide: 1ſt, The defendant on 12th March 1806, after reading the letter in queſtion, together with ſeveral others, ſubſequently written by the captain while a priſoner at Verdun and giving a full account of all the circumſtances of the caſe, had adjuſted the policy as for a total loſs, and put his initials on the back of it; which is conſidered tantamount to an order for the money. —2dly, It was denied that the letter of 5th December was at all material to be communicated.

Park for the plaintiff, as to the firſt point contended, that an adjuſtment made on a full diſcloſure of facts which even might have been an anſwer to an action on the policy, was concluſive. In Hogg *v.* Gouldney (*a*), Lee C. J. was of opinion, that an adjuſtment was like a note of hand, and that it lay upon the party who diſputed it to ſhew that it had been obtained by fraud. This rule had been ſince relaxed; but in Rodgers *v.* Maylor (*b*), Lord Kenyon ſaid, he did not think it neceſſary to declare on the adjuſtment ſpecially, and that it was *prima facie* evidence againſt

(*a*) Beawes Lex. Mer. 310.
(*b*) Sittings after Trinity Term 1790, Park, 118.

the defendant. And in the late caſe of Bilby *v.* Lumley (*a*), the Court of K. B. held, that money paid by one with full knowledge of all the circumſtances, cannot be recovered back again, on account of ſuch payment having been made under an ignorance of the law.

The *Attorney General* denied that the laſt caſe was in the ſlighteſt degree in point; as the money had there been actually paid. The diſtinction was between a payment, and a mere adjuſtment of the loſs. In Rodgers *v.* Maylor, Lord KENYON ſaid, if there had been any miſconception of the law or fact, upon which an adjuſtment had been made, the underwriter was not abſolutely concluded by it; and in De Garron *v.* Galbraith (*b*), in which the whole court held, that if after an adjuſtment, the underwriters ſuſpected the honeſty of the tranſaction, the plaintiff muſt produce other evidence; the ſame Judge obſerved, that ſhutting the door againſt enquiry after an adjuſtment, would be putting a ſtop to candor and fair dealing amongſt the underwriters.

Lord ELLENBOROUGH.—There are two queſtions here to be conſidered: 1ſt, As to the concluſiveneſs of the adjuſtment; 2dly, As to the materiality of the letter.—1ſt, The caſes are clearly diſtinguiſhable, where, upon a diſpute, the money is paid, and where there is only a promiſe to pay. If the money has been paid, it cannot be recovered back, without proof of fraud; but a promiſe to pay will not in general be

(*a*) 2 Eaſt. 469. (*b*) M. T. 36 G. 3. Park 118.

binding,

binding, unleſs founded on a previous liability. What is an adjuſtment?—An admiſſion, on the ſuppoſition of the truth of certain facts ſtated, that the aſſured are entitled to recover on the policy. Perhaps, if properly ſtamped, it might be declared on as a promiſſory inſtrument. Here it is a mere admiſſion, and there was no conſideration for the promiſe it is ſuppoſed to prove. An underwriter muſt make a ſtrong caſe after admitting his liability; but until he has paid the money, he is at liberty to avail himſelf of any defence, which the facts or the law of the caſe will furniſh. 2dly, Reſpecting the letter, his Lordſhip directed the Jury to conſider, whether it would have made the underwriters regard the Ganges as a miſſing ſhip, and require an encreaſed premium; or, whether it either would not have excited their curioſity, or could not have led them to any uſeful information.

The plaintiff had a verdict.

Park and *Marryat* for the plaintiff.

The *Attorney General* for the defendant.

[Attornies, *Rivington* and *Crowder* & Co.]

Vide Marſhall's Law of Inſurance, book 1. c. 15. § 3. Park's do. c. 6. p. 117, 8.

LECK

Same day.

LECK AND ANOTHER *v.* MAESTAER.

A workman for hire is not only bound to guard the thing bailed to him againſt ordinary hazards, but likewiſe to exert himſelf to preſerve it from any unexpected danger to which it may be expoſed.

ACTION on the caſe for negligence.—The defendant is proprietor of a dry dock, on the river Thames; into which a ſhip of the plaintiff's had been put to be repaired. Whilſt ſhe lay here, during a remarkably high tide, the dock-gates were burſt open by the water, and ſhe was thereby forced againſt another veſſel, and greatly injured. When the accident happened, although in the day-time, the workmen were all abſent, and there was only a watchman left to take care of the ſhipping in the dock. The plaintiff's witneſſes deſcribed the gates as having been rotten, and imputed their giving way to this circumſtance. They thought, however, that with a proper number of hands, the gates might ſtill have been ſhored up, ſo as to bear the preſſure of the water.

The *Attorney General*, for the defendant, ſaid, he could ſhew, that the gates were in a perfectly ſound ſtate, fit to reſiſt any preſſure that could be expected or foreſeen, and that they had burſt open, merely from the uncommon heighth of the tide, for which the defendant could not be anſwerable. But,

Lord ELLENBOROUGH held, that it was the duty of the defendant to have had a ſufficient number of men in the dock, to take meaſures of precaution, when the danger was approaching, and that he was clearly anſwerable for the effects of this deficiency.

The

The plaintiff therefore had a verdict.

Garrow and *Marryat* for the plaintiff.

The *Attorney General* for the defendant.

[Attornies, *Nind*, and *Crowder & Co.*]

The bailment in this case comes under the 2d subdivision of Sir William Jones's 3d class, or *locatio operis faciendi*; where work and labour, or care and pains, are to be performed or bestowed on the thing delivered, for a pecuniary recompence; and where, as the contract is for the advantage of *both* the contracting parties, there is required on the part of the bailee *ordinary* diligence, or that care which *every man of common prudence*, and capable of governing a family, takes of *his own* concerns. Essay on Bailments, 85, 90, 119. The defendant therefore was not answerable for *slight neglect*, or the omission of that diligence which *very circumspect and thoughtful persons* use in securing their own goods and chattels, as if he alone had derived benefit from the bailment; any more than for a loss by *inevitable accident*, or *irresistible force*, for which no bailee shall be charged, except by special agreement. But his failing in the day-time to have a competent number of workmen in the dock, shewed a want of that care of the plaintiff's ship, which it might reasonably be expected he would have taken of her, had she been his own property.

YOUNG AND ANOTHER *v.* WRIGHT.

Same day.

ASSUMPSIT on a bill of exchange for 460*l.* drawn by the defendant Thomas Wright, on the 25th of June 1807, directed to and accepted by Charles Wright,

In an action by the indorsee of a bill of exchange, if the declaration states the indorsement to have been made

before the bill became due, and it appears in evidence to have been made *after* the bill was due, this is not a material variance.

Wright, payable at 3 months after date to the order of the drawer, indorsed by him to B. Tenant, and indorsed by the latter to P. Young the elder, one of the plaintiffs, who had indorsed it to himself and the other plaintiff.

The declaration stated all the indorsements to have been made *before* the bill became due. It appeared that Tenant, for a valuable consideration, had delivered the bill to P. Young the elder, *before* it was due, but had not put his name upon it, till *after* it was due. An objection being taken on this ground,

Lord ELLENBOROUGH, on the authority of the case of Russell *v.* Langstaff (*a*), held the variance to be immaterial. There the indorser's name had been put upon the paper before the bill was drawn; and though it was stated, that the indorsement was made *after* the drawing of the bill, this was considered sufficient to support the declaration. The present case was the converse of that, but must be governed by the same principle.

The admissions of the attorney in a cause are evidence against his client, only when they are made with a view to obviate the necessity of proving the facts admitted, at the trial.

To excuse the want of notice of the dishonour of the bill being sent to the drawer, a witness was asked, whether he had not been told by the attorney that it was an accommodation bill? The question was objected to on the ground, that the attorney was not the defendant's agent with respect to the bill, nor could his declarations on the subject be evidence.

(*a*) Doug. 514.

Lord

Lord ELLENBOROUGH.—If a fact is admitted by the attorney on the record, with intent to obviate the neceſſity of proving it, he muſt be ſuppoſed to have authority for this purpoſe, and his client will be bound by the admiſſion; but it is clear, that whatever the attorney ſays in the courſe of converſation, is not evidence in the cauſe.—His Lordſhip therefore overruled the queſtion, and the fact of the acceptor having no effects of the drawer in his hands, was eſtabliſhed by a confeſſion of T. Wright himſelf.

The defence to the action was *uſury* in the original formation of the bill. To make out this,

If a bill of exchange is drawn upon an agreement between one of the original parties to it and a perſon not a party to it, that the latter ſhall get it diſcounted by another perſon likewiſe not a party to the bill, upon uſurious terms, and it is ſo diſcounted accordingly, the bill is void for the uſury, in the hands of an innocent indorſee.

One John King was called, who ſwore, that he had been long in the habit of diſcounting bills for Charles Wright, the acceptor. At firſt he did it at the rate of 5*l. per cent. per annum*; and afterwards he diſcounted bills for him, at 3 months, at 10*l.* in the 100*l.* or 40*l. per cent. per annum.* He had agreed to get the bill in queſtion diſcounted for him on theſe terms; and he accordingly got it diſcounted by a Mr. Reeves, who gave for it ſome cheques, which were never paid, and goods which, when reſold, produced only 50*l.*; this being the whole ſum which Charles Wright had received upon it.

The *Attorney General*, for the plaintiff, after arguing ſtrongly againſt the credibility of the witneſs, who ſtood unconfirmed, maintained, that even if this account were true, the bill would be good in the hands of a *bonâ fide* holder, for a valuable conſideration: the

the ſuppoſed uſury had been committed between King and Reeves, third perſons, and no parties to the bill: there was no uſury therefore in its original formation, but only in negociating it; by which the preſent plaintiff could not be at all affected.

Lord ELLENBOROUGH held, however, that if the witneſs was believed, there muſt be a verdict for the defendant. According to the evidence given, at the time the bill was drawn, there was a corrupt agreement, that it ſhould be diſcounted at uſurious intereſt; by which it was vitiated, into whatever hands it might afterwards come.

The Jury found a verdict *for the plaintiffs.*

The next cauſe was an action at the ſuit of the ſame parties, on the ſame bill, againſt C. Wright, the acceptor. To confirm King's teſtimony, a broker was now called, who merely ſaid, that about the time ſpecified, he had ſold goods, by King's deſire, of the kind decribed; but Lord ELLENBOROUGH holding this to be no confirmation, the jury again found for the plaintiffs.

The *Attorney General* and *Taddy* for the plaintiffs.

Garrow and *Dampier* for the defendant.

[Attornies, *Palmer & Co.* and *Redit.*]

Vide 12 Ann. c. 16. Lowe *v.* Waller, Doug. 736. Cuthbert *v.* Haley, 8 T. R. 390. Parr *v.* Eliaſon, 1 Eaſt, 92. 3 Eſp. Caſ. 210. S. C. Daniel *v.* Cartony, 1 Eſp. Caſ. 273.

COURT OF COMMON PLEAS.

SITTINGS AFTER TERM IN LONDON.

JOLLEY *v.* TAYLOR.

Saturday, December 12.

In assumpsit against a carrier for the non-delivery of written instruments, it is not necessary to prove a notice to the defendant to produce them, before giving parol evidence of their contents.

ASSUMPSIT against the proprietor of a stage coach, on a promise to carry three promissory notes of 5*l.* each from Ware to London; with the common money counts.

To prove the delivery of the notes, a witness was called, who was stated to have remitted them to the plaintiff, in discharge of a debt. Being released, he was proceeding to describe the notes, when—

Best, Serjeant, for the defendant, objected, that the plaintiff must previously prove a notice to produce them. Promissory notes, like all written instruments, should speak for themselves, and were not to be described according to the loose recollection of witnesses. He relied on the case of Cowan *v.* Abrahams, 1 Esp. Cas. 50, where in trover for a bill of exchange, Lord KENYON held, that the defendant must have notice to produce it, or the plaintiff could not go into evidence of its being in the defendant's possession.

Sir JAMES MANSFIELD C. J.—A notice here appears to me to be unnecessary. I can make no distinc-

tion as to this purpoſe between written inſtruments and other articles,—between trover for a promiſſory note, and trover for a waggon and horſes.

The witneſs then proved the delivery of three 5*l.* notes of the Hertford bank to the defendant; for the amount of which the plaintiff recovered a verdict.

Shepherd, Serjeant, and *Lawes* for the plaintiff.

Beſt, Serjeant, for the defendant.

[Attornies, *Pringle* and *Morton*.]

The authority of Cowan *v.* Abrahams was conſiderably ſhaken by the caſe of Bucher *v.* Jarratt, 3 B. and P. 143. in which the Court of C. P. held, that in trover for the certificate of a ſhip's regiſtry, the certificate may be proved by the production of the regiſtry from which it was copied; though no notice has been given to produce the certificate itſelf. *Vide* alſo Aickle's caſe, 1 Leach Cro. Caſ. 330, where on an indictment for ſtealing a bill of exchange, parol evidence of the bill was received, without notice to produce it having been given, either to the priſoner or his attorney.

PEDERSON *v.* STOFFLES.

Same day.

An honorary obligation, which will be affected by the event of the cauſe, is not an objection to the competency of a witneſs.

ASSUMPSIT for work and labour on board a ſhip, of which the defendant was maſter. Plea, *non aſſumpſit*.

It appeared that the parties were both Ruſſian ſubjects, and that the plaintiff ſerved on board the defendant's ſhip, in her paſſage from Archangel to London. The defence was, that, the plaintiff had ſigned

the ſhip's articles; by which all the ſeamen engaged to complete the voyage back to Archangel,—and that he had thus forfeited his wages, by deſerting.

To prove that there had been articles of this import, which had been ſince deſtroyed, the conſignee of the ſhip was called as a witneſs. Being examined on the *voir dire*, as to whether he had not indemnified the defendant's bail, he anſwered, that he had not made any promiſe, or come under any engagement to that effect; *but that he conſidered himſelf bound in honour to indemnify them.* Upon which—

Vaughan, Serjeant; and *Wigley*, objected to his competency on the ſcore of intereſt, and contended, that ſince under an honorary obligation, there muſt be the ſame bias on his mind, ſo he was equally incompetent, as if he were legally liable.—*Wigley* mentioned a caſe which had occurred on the Oxford circuit, where a gentleman being produced as a witneſs in an action on the game laws, and having anſwered to queſtions put to him by the defendant's counſel, "That the plaintiff was his ſervant; that he had not promiſed to indemnify him; but that he conceived himſelf *bound in honour* to ſave him harmleſs from the conſequences of the action, if he failed,"—was rejected as incompetent.

Beſt, Serjeant, *amicus curiæ*, reminded the Chief Juſtice of a caſe on the Home Circuit; where he himſelf having taken a ſimilar objection, it was overruled by his Lordſhip; who, then ſaid, that the ſame honour by which the witneſs conſidered himſelf bound to pay a ſum of money for which he was not liable, would lead him to ſpeak the truth between the parties.

Sir JAMES MANSFIELD, C. J.—I am of opinion, that a mere obligation in honour, is not an objection to the competency of a witneſs. It is long ſince I practiſed at Niſi Prius; but that is the impreſſion on my mind, and I think the rule is founded in good ſenſe.

The witneſs was then examined as to the contents of the articles, and the plaintiff having left the ſhip; and clearly made out the defence which had been opened.

Verdict for the defendant.

Vaughan, Serjeant, and *Wigley* for the plaintiff.

Shepherd, Serjeant, and *Adolphus* for the defendant.

[Attornies, *Morgan* and *Gregſon* & Co.]

In Fotheringham *v.* Greenwood, Strange, 129. Pratt, C. J. is repreſented as having ruled at niſi prius that, "he who apprehends himſelf intereſted, though *ſtricto jure* he is not, is no witneſs." But the witneſs produced there was directly intereſted in the cauſe, and without a releaſe from the plaintiff, was clearly incompetent; that having been an action on 9 Ann. c. 14. to recover money belonging to the plaintiff, which the witneſs having had in his hands, had loſt at play to the defendant (*a*).—*Darnall*, *Serjeant*, to be ſure, there cites an expreſs deciſion of Parker, C. J. againſt the admiſſibility of the above evidence; but of late years, the courts have endeavoured, as far as poſſible, to let the objection go to the *credit* rather than to the *competency* of a witneſs; and the rule now ſeems eſtabliſhed, that no objection can be made to a witneſs, on the ſcore of intereſt, unleſs he muſt be immediately benefited, or injured by the event of the ſuit; or unleſs the verdict to be obtained by his evidence, or given againſt it, will be evidence for or againſt him in another action, in which he may afterwards be a party. 1 T. R. 163. 300.—3 T. R. 27.—There ſeems the leſs reaſon for rejecting a witneſs under an honorary *liability*; as it is no objection that a witneſs merely *hopes* or *expects* a *benefit*, or has an ideal intereſt in the queſtion at iſſue. Leach Cro. Caſ. 151. Gilb. Law Ev. 124.

(*a*) *Vide* Corking *v.* Jarrard, *ante* 37.

BRADY

BRADY *v.* SHEIL, ADMINISTRATRIX, &c.

Saturday, December 12.

Where at a meeting of the creditors of a deceased insolvent, called by his executor, they agree to a rateable distribution, on the faith of which he executes a deed of assignment of all the assets which have come to his hands, for the benefit of the creditors; one of them cannot afterwards refuse to come in under the deed, and bring an action for his debt against the executor.

ASSUMPSIT for goods sold and delivered by plaintiff to defendant's intestate. Plea, the general issue.

The debt being proved,

Best, Serjeant, for the defendant, undertook to shew that, notwithstanding the existence of the debt, the plaintiff had waived his right to bring this action, and must therefore be nonsuited. He stated, that as soon as the defendant, Mrs. Sheil, had taken out administration to her late husband, finding his effects insufficient to pay all his creditors fully, she had called a meeting, and proposed a rateable distribution, to which they at first unanimously assented. A deed of assignment, with covenants not to sue, &c. was accordingly prepared; but upon some dispute respecting who should be the trustees, the plaintiff refused to come in under it; though he declared he should give no further trouble. The deed was afterwards executed by the defendant, and all the creditors, with the exception of the plaintiff. Under the deed, a ship (the only assets that had come to the defendant's hands) passed to trustees for the benefit of the trust. *Best*, Serjeant, contended that the action could not be maintained after the defendant, in consequence of the plaintiff's assent, had parted with all the assets that had come to her hands, and the other creditors had been induced to execute the deed and accept of a com-

compoſition: and he cited Butler v. Rhodes, 1 Eſp. Caſ. 236. (*a*) as an authority in point.

The CHIEF JUSTICE ſeemed to think that this, if made out by evidence, would have been a good defence;—but the witneſſes brought forward to prove the deed being rejected on the ſcore of intereſt, the plaintiff had a verdict.

The creditors of a deceaſed inſolvent may be compelled to ſubmit to a rateable diſtribution of his effects.

Sir JAMES MANSFIELD ſaid, he wiſhed it were more generally known, (for he believed, that lawyers in the Court of K. B. were not aware of it,) that through the medium of a court of equity, the creditors of a deceaſed inſolvent may always be compelled to take an equal diſtribution of the aſſets. It was only neceſſary for a friendly bill to be filed againſt the executor or adminiſtrator, to account; after which, the chancellor would injoin any of the creditors from proceeding at law (*b*).

Shepherd, Serjeant, and *Lawes*, for the plaintiff.

Bolt, Serjeant, and *Barwis*, for the defendant.

[Attornies, *Leſlie* and *Raine*]

(*a*) *Vide* Peak. Caſ. 238. and the caſes there referred to.

(*b*) It would appear that the ſame object may be gained, by the executor or adminiſtrator confeſſing a judgment to a truſtee, to a ſufficient amount to cover the aſſets, and afterwards pleading this judgment to an action by a litigious creditor. In Meux q. t. v Howell, 4 Eaſt, 10. in anſwer to an obſervation from the bar, that it is a comon replication to a plea by executors of a judgment recovered which is unſatisfied, that judgment was acknowledged by the executors for a larger ſum than was due to the party,—LAWRENCE, J. ſaid, "Why may "not ſuch a plea ſtate, that the "teſtator was indebted to A. B. "and C. in ſo much reſpectively, "and that the judgment was ac-"knowledged to A. in truſt to "ſecure all their debts?"

GLASFURD

GLASFURD *v.* LAING AND OTHERS.

Monday, Dec. 14

ASSUMPSIT on a bill of exchange, dated 5th Nov. 1806, for 3,180 *l.*, drawn by John Haywood and Alexander Fraſer, payable to the plaintiff at twelve months after date, and accepted by the defendants.—Plea, *non aſſumpſit.*

Although a bill of exchange, *primâ facie*, appears to be uſurious, if this is ſhewn to have ariſen from the miſtake of an agent employed in the framing of the bill, (or, *comme ſemble*, even by his deliberate act, the principals being ignorant of the intended uſury) it is not within 12 Ann. c. 16., and the holder may recover what is *bonâ fide* due upon it.

The defendants, who are the commercial agents of the drawers, reſiſted the action under a notice from them, on the ſcore of *uſury*.

In July 1804, Haywood and Fraſer, joint proprietors of a Weſt India eſtate, by their joint and ſeveral bond executed in St. Kitts, became bound to the plaintiff in the penal ſum of 12,000 *l.*, conditioned to pay 6000*l.* with 6*l.* per cent intereſt. In October 1806, all the parties being in England, the plaintiff became preſſing for payment, and it was agreed between them, that the principal ſhould be paid by two bills of exchange, the one at twelve months after date, the other at two years. Accordingly the preſent bill was drawn for 3,180*l.*, and another for 3,360*l.*—after which the bond was cancelled. But, including intereſt for the different periods the bills had to run, at the legal rate of 5*l.* per cent. they ought only to have been for 3,150*l.* and 3,300*l.*

Mr. Forbes the plaintiff's agent, however, ſwore that this aroſe from no corrupt contract, but entirely from an overſight of his own: Haywood had called upon him in a great hurry, to know the amounts of the bills to be drawn, and after calculating the ſum then due for intereſt on the bond at 6 *l.* per cent, as permitted in the Weſt Indies, he had inadvertently calculated the intereſt to grow due in this country before the debt would be diſcharged, on the ſame principle.

Sir James MANSFIELD, C. J. held that the action might clearly be maintained for the ſum *bonâ fide* due; as the exceſs in the amount of the bill had ariſen from a mere miſtake, and no intention to take uſury could at any rate be imputed to the plaintiff.

Verdict for the plaintiff, for 3,150 *l.*

Shepherd, *Williams*, and *Bailey*, Serjeants, and *Lawes*, for the plaintiff.

Beſt and *Vaughan*, Serjeants, for the defendants.

[Attornies, *Forbes* and *Winter & Co.*]

Vide 1 Hawk. P.C. 247. §. 17.—Ellis *v.* Warnes, Moor, 752.

HATHAWAY *v.* BARROW AND OTHERS.

Thurſday, Dec. 17.

THIS was an action on the caſe for a conſpiracy to prevent the plaintiff from obtaining his certificate under a commiſſion of bankrupt.

If B. and C. are convicted of a conſpiracy, on the proſecution of A., the *conviction* is not admiſſible evidence in an action afterwards brought againſt them by A. for the ſame conſpiracy.

The defendants had been convicted of the ſame conſpiracy upon an indictment preferred againſt them by the plaintiff at the Quarter Seſſions for the county of Middleſex.

After a great variety of other evidence, the counſel for the plaintiff wiſhed to put in the record of this conviction. But,

Sir JAMES MANSFIELD, C. J. held, that the conviction was not legal evidence in ſupport of the preſent action, having proceeded partly on the teſtimony of Hathaway; who, if it were admitted, would in effect be ſwearing in his own cauſe (*a*).

In an action for malfeazance, whereby the plaintiff incurred coſts in judicial proceedings, if there is an order of another court for the defendant to pay the coſts of theſe proceedings to the plaintiff, he can neither recover, as ſpecial damage, the ſum at which they are taxed, nor the *extra* coſts as between himſelf and his attorney.

The plaintiff's counſel then propoſed to prove as ſpecial damage laid in the declaration, the coſts of a petition to the Lord Chancellor. It appeared however, that the Chancellor had made an order that the coſts ſhould be paid by the defendants, and that they had been taxed by the proper officer, although they were not yet diſcharged.

(*a*) *Vide* Smith *v.* Rummens, *ante* 9.

Sir JAMES MANSFIELD ruled that no part of the coſts of the petition could be recovered in this action. For the coſts as between party and party, there was already an order of the Lord Chancellor, which might at any time be put in execution, and muſt therefore be conſidered as ſatisfaction. Nor could he admit proof of the *extra coſts*; as it would be incongruous to allow a perſon one ſum as coſts in one court, and a different ſum for the ſame coſts in another court.

The plaintiff had a verdict with 2,000*l.* damages.

Shepherd, *Runnington*, Serjeants, *Lawes*, *Alley*, and *Glead*, for the plaintiff.

Beſt, *Bailey*, *Vaughan*, Serjeants, *Marryat* and *Gurney*, for the defendants.

[Attornies, *Hanſon* and *Harris & Co.*]

WILLIAMS *v.* NUNN AND ANOTHER.

Tueſday, Dec. 22.

If a natural born ſubject of this country, domiciled abroad, comes to England, for a temporary purpoſe, and leaves it ſooner than he intended, to avoid an arreſt, this is *a departing the realm*, and an act of bankruptcy, within ſtat. 13 Eliz. c. 7. §. 1.

THIS was an action of trover directed by the Lord Chancellor, to try the validity of a commiſſion of bankruptcy iſſued againſt the plaintiff; under which the defendants, as his aſſignees, had taken poſſeſſion of his effects.

The

The chief queſtion made was, whether the plaintiff had committed an act of bankruptcy previous to 26th September 1806, the date of the commiſſion?

With reſpect to this, it appeared, that on the 1ſt of January 1804, the plaintiff entered into partnerſhip with one Edward Morgan, and carried on trade with him in London till the 31ſt of January 1805. On that day the original partnerſhip was diſſolved, and a new agreement entered into; by which the plaintiff was thenceforth to reſide in Dublin, while Morgan remained in England, and the latter was to purchaſe goods to be ſent over to Dublin without any charge for commiſſion, and to be ſold there by the plaintiff, for their joint advantage. Accordingly the plaintiff took up his reſidence in Dublin in February, and continued there till the November following. About that time, being preſſed by pecuniary difficulties he came to London to arrange his affairs, and a meeting of the creditors of himſelf and his partner was appointed for a particular day. He intended to be preſent at this meeting; but he was told the day before by a friend, that Mr. Clarke, one of his creditors in Buckinghamſhire, would be in town at the meeting, and was reſolved to arreſt him there. He ſaid, in that caſe he ſhould not attend the meeting, but leave London, and return to Dublin immediately, to avoid being arreſted. He did ſo accordingly; and being afterwards aſked why he had left England ſo abruptly, he aſſigned as his motive, *the fear of being arreſted.* His wife and family had joined him in Dublin in the ſummer of 1805, and were eſtabliſhed there during his viſit to London.

Shepherd,

Shepherd, Serjeant, for the defendants, contended that the plaintiff had committed a clear act of bankruptcy under ſtat. 13 Eliz. c. 7. Allowing him to have been domiciled in Ireland, and to have come to this country for a temporary purpoſe; his departure was equally meant to delay his creditors as if he had been reſiding in England, and muſt be attended with the ſame legal conſequences. If a man whoſe ordinary reſidence is abroad comes here for a ſhort while, and then returns to his native country, he may not by this render himſelf liable to a commiſſion of bankrupt, although his creditors are thus deprived of the means of recovering their debts; but if a merchant comes from Ireland to England to ſettle his affairs, and flies to avoid an arreſt, he is clearly within the words of the act of parliament.

Beſt, Serjeant, *contra*, denied that a man domiciled in another country could commit an act of bankruptcy, by returning to his home, to avoid an arreſt here. It cannot be ſaid that he "*abſents himſelf.*" From whence muſt a man abſent himſelf, to commit an act of bankruptcy?—from his houſe—from his uſual place of dealing. It is not enough that he abſents himſelf from the Royal Exchange, or from an hotel where he caſually lodges. Nor was this *a departing the realm* within the meaning of the legiſlature, which muſt be reſtricted to thoſe who had a fixed reſidence within the realm. Otherwiſe, if a perſon from abroad ſhould be threatened with an arreſt here, where he cannot be expected to have the means of ſuddenly diſcharging all his debts, and where he probably has no friends, prefers flying, to being confined within

within the walls of a priſon, he commits an act of bankruptcy; and though perhaps both an honeſt man and in affluent circumſtances, he is ſubject to all the rigors of our bankrupt code. If this were the law, not only foreign merchants would ſhun this country, but perſons reſiding in Ireland and the colonies would take care not to run the riſk of landing in England. What juſtice however dictated, and what the legiſlature muſt have intended, was, that when a trader is domiciled abroad, his creditors ſhould follow him thither, where his funds muſt neceſſarily be to enable him to anſwer their demands.

CHAMBRE, J.—There is ſome novelty in this queſtion; but I will ſtate my notions upon it according to my preſent impreſſions. I think that this was *a departing the realm* amounting to an act of bankruptcy, within the meaning of the legiſlature. There is a fallacy in the whole of the argument for the plaintiff, in ſuppreſſing certain words of the ſtatute. That applies only to ſubjects-born of this realm or any of the king's dominions, and ſpeaks not only of departing the realm, but of departing the realm, to the intent to defraud or hinder any creditors, likewiſe natural-born ſubjects (*a*).

(*a*) 13 Eliz. c. 7. §. 1. "If any merchant or other perſon, uſing or exerciſing the trade of merchandize, by way of bargaining, &c. and being ſubject born of this realm, or of any of the queen's dominions, or denizen, at any time hereafter *ſhall depart the realm*; or begin to keep his or her houſe or houſes, or otherwiſe to abſent himſelf or herſelf; or take ſanctuary, &c. or depart from his or her dwelling houſe or houſes; to the intent or purpoſe to defraud or hinder any of his or her creditors, being alſo a ſubject-born, as is aforeſaid, of the juſt debt or duty of ſuch creditor or creditors, ſhall be reputed, deemed and taken for a bankrupt.

It

It is not neceſſary, that to depart the realm with this purpoſe, the bankrupt ſhould have had a dwelling houſe within it; that might be urged more plauſably as to his *abſenting himſelf*; but the operation of the ſtatute is not reſtrained to thoſe who reſide here; it extends to all natural-born ſubjects. The act does not include foreigners; but it comprehends all others who depart the realm, with intent to delay or defraud their creditors. Why ſhould it not? If they happen to be here, and wiſh to eſcape from their fellow ſubjects, who have a juſt demand upon them, what does it ſignify whether they have long reſided in this country, or are lately arrived from abroad? In the preſent inſtance the credit was given in England; the creditors reſided in England; and the departing from England was as injurious to them, as if the bankrupt had with the ſame intent fled from Ireland, where he happened to be domiciled.

The jury aſked the judge, whether if a merchant ſettled in Ireland comes here for a temporary purpoſe, and returns thither to avoid an arreſt, they were bound to conſider this as in law an act of bankruptcy?

CHAMBRE, J.—I am of opinion that it is.

The jury therefore found for the defendants.

Beſt, *Bailey*, *Onſlow*, Serjeants, and *Humphreys*, for the plaintiff.

Shepherd, *Vaughan*, Serjeants, and *Marryat*, for the defendants.

[Attornies, *Magnall* and *Swaine & Co.*]

Vide Co. B. Laws, c. 4. §. 1.

BARNES

BARNES AND OTHERS, EXECUTORS OF WILLIAM WEBB, *v.* HEADLEY AND ANOTHER.

Wedneſday, Dec. 23d.

If money is lent at uſurious intereſt, a ſubſequent contract to repay the principal with legal intereſt is void, under 12 Ann. c. 16. § 1.

THIS was a feigned iſſue out of Chancery, to try whether, on the 14th day of Auguſt 1802, William Harrey and Henry Suthmier were indebted to William Webb, deceaſed, in any and what ſum of money.

Meſſrs. Harrey and Suthmier were ſugar bakers in this city, and having committed an act of bankruptcy on the day above mentioned, a commiſſion was taken out againſt them; under which Webb claimed to prove a debt of 11,672*l.* 2*s.* 4*d.* The commiſſioners, however, rejected his claim, on the ground that the debt had been contracted under an uſurious contract; and the matter coming, on petition, before the Lord Chancellor, the preſent iſſue was directed; in which, as Webb was dead, his executors were directed to be plaintiffs, and the aſſignees of Harrey and Suthmier were made defendants.

The facts of the caſe were not conteſted:

By an agreement, dated 15th May 1800, between Webb and the bankrupts, he was from time to time to advance them money, to be uſed in their trade of ſugar bakers. Oſtenſibly, there was a reſervation of intereſt upon theſe advances, only at the rate of 5*l.* per cent. per annum; but it was further ſtipulated, that

that Webb ſhould have a commiſſion of 5*l.* per cent. upon all ſugars purchaſed with his money. This was under the pretext of a compenſation to him for his trouble in making the purchaſes; but in reality was merely colourable, and a diſguiſe for uſury.

Under this agreement Webb advanced various large ſums of money; which, together with the uſurious intereſt and commiſſion, amounted in the beginning of Auguſt 1802 to 15,000*l.* Although he had bonds, mortgages, and other ſecurities to cover this debt, he at laſt became very preſſing for payment, and threatened to put his ſecurities in force. Harrey and Suthmier then told him that his ſecurities were void for uſury; which was confirmed by the opinion of counſel. Upon this, a compromiſe took place between the parties; according to which, all the uſurious intereſt was to be ſtruck off, and Harrey and Suthmier were to be indulged with time to pay the principal advanced, with legal intereſt, by inſtalments. On the 10th of Auguſt an account was ſtated between them on this principle, reducing the balance from 15,000*l.* to 11,672*l.* 2*s.* 4*d.*; and on the 13th Harrey and Suthmier ſigned an agreement, acknowledging that they were indebted in the latter ſum, and undertaking that they ſhould execute freſh bonds, mortgages, &c. to ſecure it. As ſoon as this agreement was ſigned, all the former ſecurities and all the accounts concerning the former dealings between the parties that could be diſcovered, were deſtroyed.

Theſe facts being given in evidence or admitted, the queſtion of law was argued at great length; whe-

ther, under the circumſtances, Harrey and Suthmier at the time of their bankruptcy were legally indebted to Webb?

Lens and *Bailey*, Serjeants, *Wear* and *Comyn*, of counſel for the defendants, in the negative. The vice by which the dealings between the parties were originally tainted, was not purged by the ſubſequent agreement. Webb could not diſentangle the balance he claimed from different loans under one contract, and after breaking it into parts, abandon ſome and inſiſt upon others. He could not diſunite what was in itſelf entire and of the ſame nature. If he could not claim the whole of the 15,000*l.* he was not entitled to any part of it. When money is advanced under an uſurious contract, the contract is void, and the money is irrecoverably gone. The conſent of Harrey and Suthmier to the new arrangement was unavailing. They could not ſet up what was in itſelf a nullity. At the time they ſettled the account, no debt exiſted, and if they promiſed to pay 11,672*l.* it was a promiſe wholly without conſideration. A man is not liable to the penalties of uſury till he actually takes uſurious intereſt; but a contract for uſury is from the beginning illegal and invalid. There is here no *place for repentance*; and if the lender, the moment after parting with his money, agrees to aſk no intereſt at all, he has no means of recovering his principal. The ſecond agreement, as well as the firſt, is for the payment of money on which uſurious intereſt had been reſerved; therefore, both are void. Had an action been brought on the laſt agreement, it would have been neceſſary to have averred the conſideration, and that would have appeared

peared to be bad. The one party was alarmed leſt he ſhould be ſued for the penalties of uſury, and the others dreaded being arreſted for a large debt; but what they agreed to under theſe circumſtances could not render legal and valid what was poſitively illegal and abſolutely void

Shepherd and *Beſt*, Serjeants, *Wetherall* and *J. Warren*, *e contra*.—While an uſurious bargain is in operation, one without the conſent of the other may not be able to alter it; but here the uſurious bargain was reſcinded, and another, free from uſury, ſubſtituted in its place, by the mutual conſent of both parties. A promiſe to pay a debt which could not be inforced in a court of juſtice, is good at common law, and is not prohibited by any ſtatute. The 12th Ann. c. 16, only declares that the uſurious contract ſhall be void; but the party may ſtill voluntarily charge himſelf to repay the principal with legal intereſt. The plaintiffs here do not go as is ſuppoſed on the original contract, but on the ſubſequent undertaking. At this time the debt exiſted, although the remedy was barred; and the moral obligation of the borrowers to repay it, was a good and meritorious conſideration for their promiſe. If a man applies to a court of equity to be relieved from an uſurious bargain; before he is heard, he muſt undertake to reſtore the principal and legal intereſt. Why?—becauſe juſtice requires it. But what it is juſt for a man to do, that he may undertake to do. This is like the caſe of a certificated bankrupt, who promiſes to pay a debt due before his bankruptcy, or a perſon when of age promiſing to pay a

debt contracted, not for neceſſaries, during his infancy. There is nothing immoral in uſury; it is only *malum prohibitum*; therefore, courts of juſtice will go no farther than the ſtrict letter of the ſtatute which forbids it. The ſtatute only ſays, that a man is not compellable to pay by virtue of the original lending, but leaves him at full liberty to follow the dictates of his conſcience, and to promiſe to render back the property of another man, which he has illegally got into his poſſeſſion. It would indeed be ſtrange, if thoſe who had received *in ſolido* 11,000*l.* could not in law promiſe to repay it. Beſides, the act only ſays, that contracts for payment of any principal, or money "*to be lent*," ſhall be void; and here the money was lent before the contract.—[*Chambre*, J.—That muſt be underſtood, "to be lent—*after the paſſing of the ſtatute, or the commencement of its operation.*"] But here, a debt ſubſiſting, there was a promiſe to pay it, altogether unconnected with uſury. The only caſe in the books on this ſubject, is Cuthbert *v.* Haley, 8 T.R. 390, which, though not a direct authority, is in favour of the plaintiffs; it having been there held, that if A. for an uſurious conſideration gives his promiſſory note to B., who transfers it to C., for a valuable conſideration, without notice of the uſury, and afterwards A. gives a bond to C. for the amount, the bond is good.

Lens, Serjeant, in reply. The ſtatute not merely does away the liability of the borrower on an uſurious loan, but deſtroys the foundation of it. It not only bars the remedy, but annihilates the debt. There is no *ſubſtratum* therefore on which a ſubſequent promiſe

can operate. With regard to bankrupts and infants, there was nothing illegal in the debts they have contracted; and though not legally anſwerable, if of ſufficient ability, they are bound in honour to diſcharge them. The debt ſubſiſting, they may ſuperadd the remedy. Here there is no moral conſideration to ſupport the promiſe. Webb was aware of tranſgreſſing the ſtatute from the beginning, and only conſented to give up the uſurious intereſt, from an apprehenſion of being ſued for the penalties he had incurred. The ſuppoſed conſideration aroſe *ex turpi cauſâ*, and the whole tranſaction was an attempt to defeat or evade the law. As to the caſe referred to, it is clearly not in point; C., the obligee of the bond, having been no party to the uſury between A. and B.

Chambre, J.—I am ſorry that a queſtion of ſuch general importance, and involving ſo deeply the intereſts of individuals, ſhould be decided only at *niſi prius*.—Sitting here, I cannot be governed in my conſtruction of an act of parliament by the rules obſerved in courts of equity. In Chancery, where relief is prayed, and where the party cannot be relieved without the aſſiſtance of that court, the Chancellor, before diſcharging him from the uſurious intereſt, does impoſe a condition upon him, and compel him to repay the principal with legal intereſt. Courts of equity, in many caſes, have a diſcretion whether they will interfere or not, and may therefore preſcribe the terms of their interference. Here the parties ſtand reſpectively upon their ſtrict rights, and the effect of the uſury in conſideration of law, is duly to be determined between them. It is allowed, that there is no moral obligation

to

to repay money lent upon an uſurious contract, which will ſilently raiſe an aſſumpſit. Indeed, to hold that although the ſecurities are void, there is an implied promiſe to repay the principal and legal intereſt, would effectually defeat the ſtatutes againſt uſury. In one of theſe, I believe, it is ſaid, on the other hand, that they ſhall be conſtrued ſo as moſt effectually to repreſs and beat down uſury (*a*).

The preſent queſtion depends entirely upon ſtat. 12 Ann. c. 16, and I am ſurpriſed that, in the arguments on both ſides, the language of that ſtatute has been ſo little attended to. Hearing it dropped in court yeſterday, that a cauſe about uſury was to be tried, I have copied the clauſe on which this turns. After prohibiting the taking of more than 5*l. per cent.* after 29th Sept. 1714, it goes on to enact, "that all bonds, "*contracts*, and aſſurances, whatſoever, made after "the time aforeſaid, for payment of any *principal*, or "money to be lent, or covenanted (*b*) to be performed, "upon or for any uſury, *whereupon or whereby* there "ſhall be reſerved or taken above the rate of five "pounds in the hundred as aforeſaid, *ſhall be utterly* "*void.*" Then does the contract ſuppoſed to eſtabliſh this debt come within theſe words? It is a contract for payment of a principal ſum, on which uſury had been reſerved; but it is not a contract, whereby there is reſerved above the rate of five pounds in the

(*a*) 13 Eliz. c. 8 §. 7.

(*b*) The word is "covenanted" in this ſtatute, and in the corresponding clauſes of 12 Car. 2. c. 13. and 21 Ja. 1. c. 17. but 13 Eliz. c. 8. § 3. has it "covenant," as the ſenſe evidently requires.

hundred. Thus we have to conſider, whether the words '*whereupon or whereby*,' muſt be referred to '*contracts*,' or to '*principal*.' In grammatical conſtruction, they muſt refer to '*principal*,' the laſt antecedent; and there is nothing to prevent this conſtruction; as it accords with the natural and obvious meaning of the words. Therefore, it ſtands thus:—here is a contract (the kind of contract whether, verbal or written, makes no difference) which, though not for uſury in itſelf, is for payment of money whereupon and whereby uſury had been reſerved: for this reaſon, it is within the ſtatute, and void.—I ſhould have paid the greateſt deference to the determinations of other judges, and probably ſhould have held myſelf bound by them, had any been brought before me; but in the abſence of all authority, I can look only to the language of the ſtatute; and in ſo doing, I am under the neceſſity of holding the ſecond contract to be illegal, and that Harrey and Suthmier were not, by means of it, indebted in any ſum of money to William Webb.

The plaintiff may be nonſuited in an iſſue out of chancery, as well as in other caſes.

It was then propoſed, that the plaintiffs ſhould be nonſuited; and an objection being made, that they could not, this being an iſſue out of chancery; *Chambre*, J. ſaid, there was no rule of law for this notion; and he directed *a nonſuit* accordingly.

[Attornies, *Wadeſon* and *Kirton*.]

Vide 20 Hen. 3. c. 5.—3 Hen. 7. c. 5.—11 Hen. 7. c. 8.—37 Hen. 8. c. 9.—5 & 6 Ed. 6. c. 20.—13 Eliz. c. 8.—21 Ja. 1. c. 17.—12 Car. 2. c. 13.—12 Ann. c. 16.—Bac. Abr. tit. "Uſury," (E.)—Com. Dig. tit. "Uſury," (A.)—tit. "Pleader," (2 G. 7.) Fitzroy v. Gwillim, 1 T. R. 153.

Regina

—Regina v. Sewell, 7 Mod. 120. —Lowe v. Waller, Doug. 736. —Parr v. Eliaſon, 1 Eaſt. 92.—3 Eſp. Caſ. 210. S. C.—Daniel v. Cartony, 1 Eſp. Caſ. 273. Moſes v. M'Ferlan, 2 Burr. 1005. —The equity caſes on this ſubject are ably brought together in *Ld. Cheſterfield* v. *Janſſen*, 1 Atk. 301. 2 Vez. 125.—And the reſult ſeems to be, that though where a contract is merely againſt conſcience, if the party, being fully informed of all the circumſtances of it, and of all the objections to it, voluntarily comes to a new agreement, he thereby bars himſelf of that relief which he might otherwiſe have had; yet, if the original contract be *illegal*, it does not admit of being regenerated, and no ſubſequent agreement or confirmation by the party can give it validity.

Since collecting the above authorities, I have been favoured with a MS. note of a direct deciſion at *Niſi Prius* upon this very point, taken by a gentleman at the bar, to whom the profeſſion is under the greateſt obligations.

WRIGHT v. WHEELER.—*Worceſter Spring Aſſizes*, 1799. Debt on bond.—Plea generally, that the bond was given for the performance of an uſurious contract. The plaintiff had in 1791 lent the defendant 1,000*l.* for the ſecuring of which, with lawful intereſt, a bond was given, and the defendant alſo agreed to give the plaintiff a ſalary of 50*l.* a-year, as a clerk in his brewery. It was not intended that the plaintiff ſhould perform any ſervice for the defendant there, but the ſalary was a mere ſhift, to give the plaintiff more than 5, viz. 10 *per cent.* intereſt, for his money. In 1793, one year's ſalary having been paid, the parties agreed, that it ſhould be deducted from the principal, the deed ſecuring this ſalary cancelled, and a freſh bond taken for the remaining principal, with 5 *per cent.* intereſt, and on this bond the action was brought.

Plumer, for the defendant, objected, that the original contract between the parties being infected with uſury, could not be cured by any ſubſequent agreement; that the act of parliament made void all contracts and aſſurances founded in uſury, and whether taken at the time, or afterwards, could make no difference.

Lawrence, J.—The act of parliament only makes void contracts whereby more than 5 *per cent.* is ſecured. The original contract between theſe parties was certainly uſurious, and no

action could have been maintained on the firſt bond; but there was nothing illegal in the laſt bond; it was not made to aſſure the performance of the firſt contract, nor does it ſecure more than 5 *per cent.* intereſt to the plaintiff. The parties ſaw they had before done wrong; they rectified the error they had committed, and ſubſtituted for an illegal contract one that was perfectly fair and legal. I ſee no objection to their doing that, and therefore am of opinion, that the preſent action is maintainable.——*Verdict for plaintiff.*

Note. In the outſet of the cauſe, *Leyceſter* objected that the plea was bad, in not ſtating how the uſury was committed: but Lawrence anſwered, that if the defendant intended to have availed himſelf of that, he ſhould have demurred; but on this iſſue he muſt try, whether it was uſurious or not.

CASES

ARGUED AND RULED AT

NISI PRIUS

IN K. B.

In Hilary Term,

48 GEORGE III. 1808.

FIRST SITTINGS AT WESTMINSTER.

Wednesday, January 27.

DUDLEY *v.* SMITH.

The proprietor of a ſtage coach is anſwerable for the negligence of the driver, from the uſual place of taking up paſſengers, not only till the coach arrives at its place of deſtination, but till the paſſengers are there ſafely ſet down.—The driver of a ſtage coach, before paſſing through any place that is dangerous, is bound to inform the paſſengers of the full extent of the dan-

CASE for negligence, againſt the owner of a ſtage-coach.—The declaration ſtated, that the plaintiff, *Elizabeth Dudley*, became and was an outſide paſſenger on the defendant's coach, to be ſafely and ſecurely conveyed thereon, from a place called the *Red Lion*, in the Strand, to Chelſea; and that it was thereupon the duty of the defendant to have ſo conveyed her; but that he failed to do ſo; "and on the contrary thereof, defendant afterwards, and whilſt plaintiff continued as ſuch outſide paſſenger on the ſaid coach, and before ſhe was ſet down, or had alighted therefrom, to wit, on the day and year aforeſaid, at Chelſea aforeſaid, by a certain then ſervant of the defendant, employed and truſted by him upon that occaſion, wrongfully, injurioufly, careleſsly, negligently,

and improperly, drove the ſaid coach through and under a certain low and narrow gateway there; whereby plaintiff was then and there thrown and knocked down from and off the ſaid coach, &c."

ger; and if he proceeds without giving them this information, the proprietor is liable for any injury they may thereby ſuffer, which they might have eſcaped by alighting.

It appeared in evidence, that the plaintiff was carried ſafely as an outſide paſſenger on the top of the coach, to the *Croſs Keys* at Chelſea, where it ſtops. When arrived before the gateway of this Inn, leading to the ſtable-yard, the coachman requeſted her to alight there, as the paſſage into the yard was *very awkward*. She ſaid, as the road was dirty, ſhe would rather be driven into the yard. He then adviſed her to ſtoop, and drove on. The conſequence was, that ſhe was ſtruck violently on the ſhoulders and back by a low archway in the paſſage, and received a perſonal injury, of which ſhe is not likely ever to recover. A ſurveyor ſwore, that from an admeaſurement he had made, this archway was only 9 feet 9 inches from the ground, and that the top of one of the defendant's coaches, which ſeemed exactly of the ſame height with all the others, was 8 feet 9 inches from the ground, allowing an interſtice of 12 inches for the body of any perſon attempting to ride through upon it. The plaintiff's caſe being cloſed,—

The *Attorney General* contended, that this evidence would not ſupport an action againſt the proprietor of the coach, whether blame was, or was not, imputable to the driver. The declaration ſtated it to be the duty of the defendant to carry the plaintiff ſafely and ſecurely from the Red Lion in the Strand to Chelſea;

he had done ſo, and brought her to the ſpot where the coach was accuſtomed to ſtop. Here the journey was completed, and ſhe was deſired by the coachman to ſtep down. If after that, ſhe choſe to remain on the coach, and to ride into the yard, into which the defendant was not bound by his undertaking to carry her, his reſponſibility ceaſed; he was not anſwerable for the negligence or miſconduct of his ſervant ſubſequent to the termination of the journey, and the plaintiff's only remedy was againſt the coachman, if ſhe had any legal cauſe of complaint.—But, in fact, ſhe had been warned of her danger; ſhe had been told that the paſſage was *very aukward*, and if ſhe ſtill perſiſted to continue on the coach, it was at her own peril.

Lord ELLENBOROUGH.—The defendant was bound to carry the plaintiff from the uſual place of taking up to the uſual place of ſetting down. As coachowner therefore, he was anſwerable for the negligent acts of his ſervant, till the plaintiff was ſet down at the uſual place for paſſengers alighting at Chelſea. This appears, for the inſide paſſengers at leaſt, to have been the yard. If the coachman had ſaid to her, "the "others will be ſafe in proceeding, but you muſt go "down here, as you cannot remain upon the coach "without danger to your life," ſhe could only have blamed her own imprudence for what followed. But he ſhould have given her the materials to judge, if he was to leave her to make her election. He told her the paſſage was *aukward*; whereas, according to the evidence, it was impracticable.

The

The *Attorney General* then undertook to prove, that with proper caution the plaintiff might have rode through into the yard upon the coach, without any injury; and two witneſſes actually ſwore that they had done ſo frequently.

Lord ELLENBOROUGH left it to the jury to conſider, whether the coachman had ſufficiently warned the plaintiff of her peril, or whether the paſſage was more dangerous than ſhe had reaſon to ſuppoſe it to be, from the manner in which ſhe heard it deſcribed by him.

The jury found a verdict for the plaintiff, with 100*l.* damages.

Garrow and *Marryat* for the plaintiff.

The *Attorney General* for the defendant.

[Attornies, *Davis* and *Holloway*.]

Vide Aſton *v.* Heaven, 2 Eſp. Caſ. 532.

FIRST

FIRST SITTINGS IN LONDON.

FALCONER *v.* HANSON.

Thurſday, January 28.

THIS was an action of covenant upon a charter-party; in which the parties took iſſue upon, whether the ſhip ſailed on her voyage with the firſt fair wind after taking in her cargo.

If a witneſs examined upon interrogatories, refers to a writing itſelf not evidence, as containing a ſtatement of the facts to which he is interrogated, this writing may be read as part of his depoſition.

By rule of court, ſeveral of the witneſſes had been examined upon interrogatories. Amongſt theſe was the captain, whoſe depoſition ſtated that the *log-book* contained a true account of the time when the veſſel ſailed, the ſtate of the weather, &c.

Garrow, for the plaintiff, accordingly propoſed to read ſeveral extracts from the log-book, as evidence.

Park, on the other ſide, objected to this, on the ground, that if the witneſs had been preſent, the log-book could only have been uſed by him to refreſh his memory, and could not have been read as evidence, although he had ſworn in the box that its contents were true (*a*).—But,

(*a*) Peak. Law Ev. 12,14.—It has been held, that the *log-book of a man of war* is itſelf evidence, to prove the time of the ſailing of a ſhip, forming part of a convoy, which the man of war had eſcorted.—D'Iſraeli *v.* Jowett, 1 Eſp. Caſ. 427.

Lord ELLENBOROUGH held, that the parts of the log-book referred to in the depoſition might be received in evidence, in the ſame manner as if they had been copied, and inſerted in the depoſition itſelf as coming directly from the deponent.

What ſufficient evidence of a witneſs being abroad, to let in his examination upon interrogatories as evidence.

The depoſition of another witneſs, who had been examined in the ſame manner, was rejected, for want of ſufficient proof of his being out of the country. It was ſworn, that he was a ſea-faring man, and that in June laſt he belonged to a veſſel lying in the river Thames; but of what nature this veſſel was, or whither ſhe was bound, it did not at all appear.

The CHIEF JUSTICE was diſpoſed to receive the depoſition upon this evidence of the witneſs's abſence from the kingdom, if it could further be ſhewn, that any efforts had been recently made to find him; but nothing of this kind being proved, he thought the evidence of the witneſs being beyond the juriſdiction of the court, too vague to admit his written depoſition (*a*).

The cauſe was afterwards referred.

Garrow and *Gurney* for the plaintiff.

Park and *Marryat* for the defendant.

[Attornies, *Duff* and *Crowder* & Co.]

(*a*) *Anonymous*, 2 Salk. 691.

SECOND SITTINGS AT WESMINSTER.

DOE *ex d.* WHITE *v.* CUFF.

Tuesday, February 2.

In ejectment by one tenant in common against another, it is neceſſary either to prove an actual ouſter, or to produce the conſent-rule to confeſs leaſe, entry, *and ouſter.*

EJECTMENT on a mortgage deed.

It appeared, that under this deed the leſſor of the plaintiff was entitled to an undivided moiety of one tenement, and three-fourths of another; and that the defendant was in the poſſeſſion of the whole of both.

The *Attorney General* contended, that under theſe circumſtances, the leſſor of the plaintiff was bound to adduce evidence of an *actual ouſter.*

Park, e contra, maintained, that the defendant, by appearing, confeſſed leaſe, entry, and *ouſter*; and that if he did not chooſe to confeſs theſe, though there might be *a nonſuit*, he muſt be turned out of poſſeſſion.

The *Attorney General* denied that the defendant's appearance alone amounted to a confeſſion of the ouſter. It ought to be ſhewn on what terms he was admitted as defendant inſtead of the caſual ejector. The conſent rule ſometimes was, that "the defendant ſhall confeſs leaſe and entry, and alſo ouſter of the nominal plaintiff, in caſe an actual ouſter of the plaintiff's leſſor by the defendant ſhall be proved at the

the trial, but not otherwiſe" (*a*). Therefore, the conſent rule muſt be given in evidence; and without it, there was no ſort of proof to ſupport the greater part of the declaration on the record.

Park ſtood upon the practice, and urged the inconvenience which would ariſe from holding that it is in all caſes neceſſary to prove the conſent rule.

Lord ELLENBOROUGH held, that the leſſor of the plaintiff was bound to do ſo in the preſent inſtance, to ſee whether the rule was common or ſpecial.

The rule was then put in, and appearing to be in the common form, the leſſor of the plaintiff had a verdict.

Park and *Gazelee* for the leſſor of the plaintiff.

The *Attorney General* for the defendant.

[Attornies, *Redit* and *Sudlow*.]

(*a*) Tidd's Prac. Forms, 668.

Per HOLT, C. J.—"In caſe of tenants in common, there muſt be an actual *ouſter* of one by the other; or elſe he ſhall not be compelled to confeſs leaſe, entry, and *ouſter*." *Anonymous*, 7 Mod. 39. But it has been long ſettled, (though it was once much diſputed), that ſuch confeſſion, if made, is ſufficient proof of ouſter, for one tenant in common to maintain an ejectment againſt another. Oates ex d. Wigfall *v.* Brydon, 3 Burr. 1895. And it ſeems to be ſufficient evidence of all the facts confeſſed, except where there muſt be an *actual entry*, to avoid a fine levied with proclamations. Runnington's Ejectment, 195,

WAYNAM *v.* BEND.

Same day.

In an action against the maker of a promiſſory note, payable to A. B. *or bearer*, if the declaration ſtates that A. B. indorſed it to the plaintiff, this indorſement muſt be proved. —A promiſſory note is evidence under the money counts, only as between the original parties to it.

ACTION againſt the defendant as maker of a promiſſory note for 200*l.* payable to L. Toader, or bearer. The declaration ſtated, that L. Toader, to whom the ſum of money mentioned in the note was payable, indorſed it to the plaintiff.

No evidence of this indorſement being given; it was contended that the plaintiff's caſe was imperfect, and that he muſt be *called*.

The counſel on the oppoſite ſide anſwered, that the averment, being unneceſſary, might be rejected; and that at any rate the plaintiff might recover under the count for money had and received, the note being, "*for value received.*"

Lord ELLENBOROUGH held, that as an indorſement was ſtated, though unneceſſarily, in the count on the note, it muſt be proved; and that the plaintiff could not recover under any of the money counts, as he was not an original party to the bill, and there was no evidence of any value being received by the defendant from him.

A witneſs however was afterwards found, who proved the hand-writing of L. Toader, and the plaintiff had a verdict.

Clarke and *Gazelee* for the plaintiff.

Reader for the defendant.

[Attornies, *Bromley* and *Ref..*]

Vide Rex *v.* Stevens and Agnew, 5 Eaſt. 244.—Johnſon *v.* Collings, 1 T. R. 98.—Whitewell *v.* Bennett, 3 Boſ. & Pul. 559.—Houle *v.* Baxter, 3 Eaſt. 177.

Same day.

JOHNSON *Gent. v.* ALSTON.

An attorney retained to defend an action, is not bound to follow the inſtructions of his client, to do what is meant merely for delay.

ASSUMPSIT on an attorney's bill.

It appeared, that the greater part of the buſineſs had been done in defending an action; and that on one occaſion, the defendant had deſired that, for the ſake of delay, a plea in abatement ſhould be put in, of his being in partnerſhip with another perſon.

The defence ſtated was, that the plaintiff had neglected to put in this plea; whereby there had been a judgement againſt the defendant alone. But,

Lord ELLENBOROUGH ſaid, that by the defendant's own confeſſion, the plea in abatement was merely for delay; and that he therefore could not complain of his inſtructions concerning it being diſobeyed.

Verdict for the plaintiff.

Garrow and *Eſpinaſſe* for the plaintiff.

The *Attorney General* for the defendant.

[Attornies, *Johnſon* and *Bleaſdale*.]

Vide Pierce *v.* Blake, 2 Salk. 515, where HOLT, C. J. ſays, that "if an attorney puts in a falſe plea to delay juſtice, he breaks his oath, and may be fined for putting a deceit upon the court."—*Vide etiam* Pitt *v.* Yalden, 4 Burr. 2061.—Ruſſell *v.* Palmer, 2 Wilſ. 325.—Solomons *v.* Lyon, 1 Eaſt. 369.—Templer *v.* M'Lachlan, 2 New Rep. 136.

KENT *v.* LOWEN.

Same day.

ASSUMPSIT againſt the defendant as maker of a promiſſory note for 153*l.* 15*s.* dated 9th Auguſt, 1806, at 90 days after date, payable to Meſſrs. Coates and Co.—indorſed by them to J. Watſon, and indorſed by him to the plaintiff.

Where, to an action at the ſuit of the indorſee againſt the maker of a promiſſory note, the defence is, uſury in its original concoction; letters from the payee to the maker, ſtating the conſideration as between them, if ſhewn to have been cotemporaneous with the making of the note, are admiſſible evidence to prove the uſury.

The making of the note, and the ſeveral indorſements being proved,

The *Attorney General* opened as a defence to the action, that the note had been given under an uſurious agreement between the defendant and Coates and Co. To prove this, he offered in evidence certain letters from Coates and Co. to the defendant, wherein they propoſed to accommodate him with their acceptance at 3 months, upon receiving his note for the ſame ſum at 90 days, together with *two and a half per cent. commiſſion.*

Park objected to the admiſſibility of this evidence. He allowed, that in an action againſt the acceptor of a bill, the drawer or indorſer may be called to prove, that there was uſury in its original concoction (*a*); but there the evidence was given upon oath, and an opportunity was afforded to croſs examine the witneſſes. Here, theſe letters of Coates and Co. were not upon oath, and might be colluſively written, with a view to defeat the fair claim of the plaintiff.

(*a*) Jordaine *v.* Laſhbrooke, 7 T. R. 601,—Rich *v.* Topping, Peak. Caſ. 224.

Lord ELLENBOROUGH ruled, that it was firſt neceſſary to prove by the poſt-mark, or otherwiſe, that the letters were cotemporaneous with the making of the note; and that after that, they would be evidence of an act done by Coates and Co., who were the payees of the note, and through whom the plaintiff made title. Whether the act was proved by an oral declaration, or by other evidence, his lordſhip ſaid, made no difference.

The poſt-mark being examined, did ſhew the letters to have been written juſt before the date of the note, and they were read in evidence accordingly. It further appeared, that on the 11th of Auguſt 1806, the defendant drew a bill of exchange on Coates and Co., for 150*l.* at 3 months, which they accepted; but which, when due, was diſhonoured for non-payment.

Park contended, that the 3*l.* 10*s.* for the 2½ *per cent.* upon the 150*l.* was to be conſidered not as intereſt, but commiſſion, for the trouble of Coates and Co. in accepting the bill, and accommodating the defendant (*a*).

A perſon accommodating another by acacepting a bill, cannot, like a country banker diſcounting a bill, take any thing above 5*l.* *per cent.* intereſt, by way of commiſſion, without committing uſury.

Lord ELLENBOROUGH, however, held, that there was no colour here for *commiſſion*, and that the 2½ *per cent.* muſt be conſidered as uſurious intereſt. Country bankers had been allowed to take, beſides legal intereſt, a certain commiſſion for their trouble and expence; but that was in *diſcounting* bills. Here, Coa-

(*a*) Winch *v.* Fenn, 2 T.R. 52. *n.* Hammett *v.* Yea. 1 Boſ. & Pul. 1

and Co. were acceptors of a bill, and the commiſſion was a mere cloak for uſury. Therefore, if the jury believed that the note was made upon the terms held out in the letters, they muſt find for the defendant.

And ſo the defendant had a verdict.

Park and *Eſpinaſſe* for the plaintiff.

The *Attorney General* for the defendant.

[Attornies, *Owen* and *Beckett*.]

In this caſe, the *Attorney General* likewiſe contended, that the defendant had received *no conſideration* for the note, and that therefore the plaintiff could not maintain an action upon it, even if he was an indorſee for value, as there was reaſon to ſuppoſe that it had not been indorſed to him till ſubſequently to its becoming due. But it appeared afterwards, that the plaintiff had received it from Watſon in payment of goods ſold, before it was due; and Lord ELLENBOROUGH ſaid, that at any rate the note was not to be conſidered as made without conſideration, as the maker had received a croſs acceptance from the payees, and there had been an exchange of ſecurities between the parties. It follows, that in *Wallace* v. *Herducre*, *ante* 47. if it had been clearly made out, that there had been an exchange of ſecurities, the bill there would have been conſidered as accepted for value; and upon proof of Maine's bankruptcy before the indorſement, I preſume the plaintiff would have been nonſuited. Rolle *v.* Caſton, 2 H. Bl. 570.—Buckler *v.* Buttivant, 3 Eaſt. 72.

COURT

COURT OF COMMON PLEAS.

FIRST SITTINGS, IN TERM, AT WESTMINSTER.

Monday, January 25.

HAYDEN *v.* HAYWARD.

In an action for the value of an article ordered of the plaintiff by the defendant, but returned by the defendant to the plaintiff, it is incumbent on the plaintiff to prove, that it was made agreeably to the order.

ACTION for goods sold, to recover the value of a riding-habit, made by the plaintiff for the defendant's wife.

It appeared in evidence, that the plaintiff was sent for by the defendant, to take measure of Mrs. H. for a riding-habit; that he did so, and made one which he sent home to the defendant's house; but that it was returned back to him the same day.

Bayley, Serjeant, for the defendant, contended, that it was incumbent on the plaintiff to prove that the riding-habit was made agreeably to order; as the true reason of its being sent back was, that it did not at all fit.

Cockell, Serjeant, on the other side, maintained, that the *onus* lay upon the defendant, to prove that the article furnished was improperly made. The defendant had given the order, and the evidence of a riding-habit being delivered at his house, was presumptive proof that the order was duly executed Therefore, it lay with the defendant to discharge himself, by rebutting this presumption.

Sir JAMES MANSFIELD, C. J. was of opinion, that under the circumstances of this case, it behoved the plaintiff to prove, that the habit was made agreeably to the order, and that as he failed in this proof, the defendant was entitled to a verdict.

The jury nevertheless found for the plaintiff.

Cockell, Serjeant, and ——, for the plaintiff.

Bayley, Serjeant, for the defendant.

[Attornies, *Dunconb* and *Hope* & Co.]

ADDENDA

TO

CASES

RULED

AT THE SITTINGS

After MICHAELMAS *Term and in* HILARY *Term* 48 GEO. III.

SEVERAL of the cafes reported in the preceding part of this volume having been fubfequently brought before the court, on motions for new trials or in arreft of judgment, it will be proper here fhortly to mention the proceedings concerning them *in Banco*, by way of confirming or qualifying the decifions at *Nifi Prius*. For the future, no cafe will be inferted in thefe Reports, till finally adjudged in the court from which the record iffues.

1. In *Amey* v. *Long*, (p. 14.) a motion was made in arreft of judgment on two grounds: 1ft, that a writ of *fubpæna duces tecum* is not of compulfory obligation on a witnefs to produce papers thereby demanded; and 2dly, that it was not fufficiently alleged in the declaration that the defendant had it in his power to produce the warrant which this writ of *fubpæna duces tecum* required him and another perfon, to whom it was directed, to produce at the trial. But after hearing thefe points argued at great length, the COURT refolved, 1ft, that under a writ of *fubpæna duces tecum* a witnefs is bound to produce all papers mentioned in it, which he has in his poffeffion, and which he has no lawful or reafonable excufe for withholding; of the validity of which excufe the Judge, and not the witnefs, is to determine; and 2dly, that the defendant's ability to produce the warrant and his want of juft caufe for not producing it were fufficiently alleged by ftating,

ing, that he could and might, in obedience to the ſaid writ of *ſubpœna*, have produced at the trial the ſaid warrant, and that he had no lawful or reaſonable excuſe or impediment to the contrary.

2. In *The Mayor of London* v. *Long*, (p. 22.) conſiderable doubts were made to appear as to the antiquity of the *oath* which had been very much relied upon, as well as concerning other parts of the evidence; and the Court directed that there ſhould be a trial at bar, in order that points of ſuch magnitude as the caſe involved might receive the moſt ſolemn conſideration.

3. In *Buchanan* v. *Rucker*, (p. 63.) a motion was made to ſet aſide the nonſuit, on the ground that by a law of the Iſland of Tobago, if a defendant *be abſent from the Iſland*, and have no attorney, manager, or overſeer there, "nailing up a copy of the declaration at the court-houſe door ſhall be deemed good ſervice;" but the Judges all agreed that ſuch a law was not binding on the reſt of the world; and that at any rate it could not apply to the defendant, who not having been proved ever to have reſided within the juriſdiction of the iſland, could not with propriety be ſaid to be *abſent* from it. A rule niſi was therefore refuſed.

4. In *French* v. *Patten*, (p. 72.) a rule to ſhew cauſe why there ſhould not be a new trial was granted; but was afterwards diſcharged, the COURT being of opinion that the original contract between the parties was ſuperſeded by the memorandum inſerted in the policy, which only wanted a ſtamp to be effectual; and that it would be contrary to the policy of the revenue laws to conſider the alteration as a mere nullity.

5. In *Cordwell* v. *Martin*, (p. 79.) the COURT refuſed a rule to ſhew cauſe why there ſhould not be a new trial; as they clearly thought that the ſeveral drawers were mutual purchaſers of each other's acceptances, and that the bill being negotiated before the alteration was made, this was in effect drawing a new bill without a ſtamp.

6. In *Rex* v. *Campbell*, (p. 91.) a motion was made for a new trial on the ſuppoſed variance objected at Niſi Prius; but the COURT, thinking that the averment in the information was ſufficiently ſupported by the charter, refuſed a rule to ſhew cauſe, and judgment was afterwards paſſed upon the defendant.

7. In

7. In *Cuming* v. *Brown*, (p. 104.) the effect of the indorſee being aware that the conſignor had not been paid in caſh for the goods, was argued very elaborately, and the Court took time to conſider; but the CHIEF JUSTICE afterwards delivered their unanimous opinion, that the *notice* to the indorſee, which is ſaid to vitiate the indorſement, means "*notice of ſuch circumſtances as rendered the bill of lading not fairly and honeſtly aſſignable;*" and that as there appeared to be no colluſion in this caſe between the defendant and the conſignee, the rule for a new trial ſhould be diſcharged.

8. In *Kymer* v. *Suwercropp*, (p. 109.) a rule for a new trial was likewiſe diſcharged;—on the ground that the defendant had not properly ſubſtantiated the fact, that he had paid the broker for the coffee delivered to him; but the Court did not give any decided opinion as to the effect of payment by the vendee to the broker before the day of prompt, when the warrants for the delivery of the goods have been parted with by the vendor and paſſed to the vendee.

9. In *Bennet* v. *Farnell*, (p. 130.) the doctrine I have ſuppoſed to have been held, that "a bill of exchange made payable to a fictitious perſon, or his order, is neither in effect payable to the order of the drawer, nor to bearer," muſt be taken with this qualification, "*unleſs it can be ſhewn that the circumſtance of the payee being a fictitious perſon was known to the acceptor.*" A new trial was refuſed in this caſe, becauſe no ſuch evidence had been offered at Niſi Prius. Lord ELLENBOROUGH ſaid, he conceived himſelf bound by *Minet* v. *Gilſon*, and the other caſes upon this ſubject which had been carried up to the Houſe of Lords, (though by no means diſpoſed to give them any extenſion,) and that if it had appeared that the defendant knew *George Abney*, the payee, to be a fictitious perſon, he ſhould have directed the Jury to find for the plaintiff.

10. In *Williams* v. *Nunn*, (p. 152.) the Court of C. P. held with CHAMBRE J. that a natural born ſubject of this country domiciled abroad, who happening to be in England for a temporary purpoſe, returns home ſooner than he intended, to avoid an arreſt, thereby commits an act of bankruptcy; and therefore diſcharged the rule niſi they had granted for a new trial.

11. In

11. In *Barnes* v. *Headley*, (p. 157.) a petition was preſented to the Lord Chancellor for a new trial; and I underſtand that when the petition came on to be argued at the ſittings after Trinity Term in Lincoln's Inn Hall, his Lordſhip ordered the caſe to be remitted to the Court of C. P.—ſo that the important queſtion, whether if money has been lent on uſurious terms, a ſubſequent contract to repay the principal with legal intereſt be valid or void, ſtill remains undecided.

12. In *Kent* v. *Lowen* (p. 177.) on a motion for a new trial, it was contended that the letters of the payee had been improperly admitted; but the Court being of opinion that they were legal evidence to prove the uſury as againſt the indorſee, the verdict for the defendant was confirmed.

In *Wallace* v. *Hardacre* (p. 45.) and *Porthouſe* v. *Parker* (p. 82.) new trials were moved for upon the *facts*, without queſtioning the directions of the Judge.

The deciſions at Niſi Prius in the *fifty-nine* other caſes reported in the firſt number were implicitly acquieſced in,

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ERRATUM in *Hathaway* v. *Barrow*, p. 151.—Inſtead of "Sir James Mansfield C. J. held, that the conviction was not legal evidence in ſupport of the preſent action, *having proceeded partly* on the teſtimony of Hathaway," read "*as it might have proceeded in part* on the teſtimony of Hathaway."

TEMPLE,
October 26th 1808.

CASES

CASES

ARGUED AND RULED AT

NISI PRIUS

IN K. B.

At the Sittings after Hilary Term,

48 GEORGE III. 1808.

SITTING DAY AFTER TERM AT WESTMINSTER.

SPYBEY *v.* HIDE.

Saturday Feb. 13.

ASSUMPSIT for goods ſold and delivered, with the uſual money counts.—Plea, *non aſſumpſit*, except as to the ſum of 5*l.* 1*s.* and as to that *a tender*.—Replication, that after the making of the ſaid tender in the ſaid plea mentioned, and before the exhibiting &c. to wit, on &c. at &c. plaintiff demanded of defendant the ſaid ſum of 5*l.* 1*s.* and then and there required defendant to pay the ſame to him plaintiff; but that defendant then and there refuſed to pay the ſame or any part thereof to plaintiff, and has from thence hitherto wholly refuſed and ſtill refuſes ſo to do.—Rejoinder, that plaintiff did not demand of defendant the ſaid ſum of 5*l.* 1*s.* *modo & formâ*, &c. and iſſue thereupon.

If to a plea of tender the plaintiff replies *a ſubſequent demand and refuſal*, it is incumbent on him to prove, that after the tender admitted in the pleadings, he demanded of the defendant the exact ſum ſpecified as having been before tendered and refuſed.

The whole debt claimed by the plaintiff was 11*l.* 6 The defendant allowed only 5*l.* 1*s.* to be due; a this ſum he offered to pay on the 16th of May l when the plaintiff refuſed to accept it.—To prove ſubſequent demand and refuſal, the evidence w that the plaintiff, on the 7th of July following, w with his Attorney to the defendant, and required to pay the ſum of 11*l.* 6*s.* the whole of which maintained was due to him. The defendant ſaid would not pay this ſum; but made no freſh tender the 5*l.* 1*s.*

Garrow and *Reader* for the defendant, contend that the plaintiff had not made out the iſſue which upon him as to the ſubſequent demand; and that 5*l.* 1*s.* was the whole ſum due, they would be entitl to the *poſtea.* The replication, admitting the tende averred that the plaintiff afterwards demanded of t defendant *the ſaid ſum of* 5*l.* 1*s.* and required him t pay the ſame. But, in fact, he had demanded a di ferent and a larger ſum; and it might as well be co tended that it would have been enough if the plainti had demanded 500*l.* which the defendant had refuſe to pay.

Park, contra, maintained, that the demand of 11*l.* 6 was a good demand of 5*l.* 1*s.* on the maxim of "*omn majus continet in ſe minus.*" The defendant knew c what ſcore the debt was claimed of him; and if he w *ſtill ready* to pay the ſmaller ſum, it was his duty agai to have tendered it. It would likewiſe be a gre hardſhip upon the plaintiff to hold this demand n

ſufficient to do away the former tender; as by lowering the demand to the 5*l.* 1*s.* he might have been ſuppoſed to have acceded to the defendant's ſtatement of accounts between them, and deprived of his remedy to recover what was really due to him.

Lord ELLENBOROUGH.—I am of opinion that the maxim "*omne majus continet in ſe minus*" does not here apply, and that the demand of the larger ſum was inſufficient. Iſſue is joined on the ſpecific fact, whether the plaintiff did or did not, after the tender of 5*l.* 1*s.* demand that very ſum of the defendant. A creditor, to do away the effect of a tender, muſt demand only the ſum before tendered, or the debtor would be put to the neceſſity of repeated tenders, and would be thus haraſſed to no ſort of purpoſe. Although the plaintiff had demanded the ſmaller ſum, this would have been no admiſſion of that being all that was due to him. He might have ſaid "I take ſo much, and I will bring an action for the reſidue." In this way the plaintiff could not have been conſidered as abandoning any part of his rights. But the defendant had no reaſon to imagine that he would accept the ſum formerly tendered upon any terms, as he had once refuſed it, and now demanded the whole of the debt which he originally claimed to be due to him. The form of the iſſue is deciſive.

However, it afterwards appeared that more than the ſum tendered was due, and the plaintiff had a verdict upon the *non aſſumpſit*.

Park and *Eſpinaſſe* for the plaintiff.

Garrow and *Reader* for the defendant.

[Attornies, *Mills* and *Few*.]

Vide Coore *v.* Calloway, 1 Eſp. Caſ. 115. *acc.*—But a tender by the debtor of more money than is due to his creditor, is a good tender of the ſum really due. *Quando plus fit quam fieri debet, videtur etiam illud fieri quod faciendum eſt.* Wade's caſe, 5 Co. 115 a. Aſtley *v.* Reynolds, Stra. 916. The perſon making the tender, however, muſt ſtate ſpecifically on what account it is made. Warner *v.* Harding, Latch 70.—So to render *a demand* effectual, the ſame information is required on the part of the creditor; as if the iſſue be, whether the plaintiff demanded 7*l.* 10*s.* for half a year's rent, on the twentieth day after it became due, it is not enough for him to prove that on that day he generally demanded half a year's rent; for he ought preciſely to ſhew upon his demand *what rent* he demands. Fabian *v.* Winſton, Cro. El. 209.

Inſtead of the preſent mode of pleading a tender, which enables the defendant to avail himſelf to a certain extent of any offer of payment he may have made, however inadequate the ſum, it were perhaps preferable to require him to aver in his plea, that ſo much and no more was due, and that he had been always ready and had offered to pay this ſum; allowing the plaintiff to traverſe either averment in his replication—as is done in pleading a ſet-off to debt on bond. Symmons *v.* Knox, 3 T. R. 65.—Grimwood *v.* Barrit, 6 T. R. 460. As the law now ſtands, if there is a vexatious tender made of a part of an entire debt, the creditor, by refuſing it, deprives himſelf of his right to intereſt upon it; or by accepting it, very likely loſes the privilege of holding his debtor to bail as a ſecurity for the reſidue.

SITTING DAY AFTER TERM IN LONDON.

BOND v. GIBSON AND JEPHSON.

Monday, Feb. 15.

ASSUMPSIT for goods sold and delivered.—It appeared that while the defendants were carrying on the trade of harness-makers together, Jephson bought of the plaintiff a great number of *bits* to be made up into bridles, which he carried away himself; but that instead of bringing them to the shop of himself and his co-partner, he immediately pawned them to raise money for his own use.

Where one of two partners, with the intention of cheating the other, goes to a shop and purchases articles such as might be used in the partnership business, which he instantly converts to his own separate use, if there was no collusion between him and the seller, this is to be considered a partnership transaction, and the innocent partner is liable for the price of the goods, without proof of any previous dealings between the parties.

Gazelee, for the defendant Gibson, contended, that this could not be considered a partnership debt, as the goods had not been bought on the partnership account, and the credit appeared to have been given to Jephson only. He allowed the case would have been different, had the goods once been mixed with the partnership stock, or if proof had been given of former dealings upon credit between the plaintiff and the defendants.

Lord ELLENBOROUGH.—Unless the seller is guilty of collusion, a sale to one partner is a sale to the partnership, with whatever view the goods may be bought, and to whatever purposes they may be applied. I will

will take it that *Jephſon* here meant to cheat his co-partner; ſtill the ſeller is not on that account to ſuffer. He is innocent; and he had a right to ſuppoſe that this individual acted for the partnerſhip.

Verdict for the plaintiff.

Garrow and *Lawes* for the plaintiff.

Gazelee for the defendants.

[Attornies, *Gearing* and *Buſſar.*]

Vide Willet v. Chambers, Cowp. 118.—Watſon's Law of Partnerſhip, 2d ed. 175. 180.

ADJOURN-

ADJOURNED SITTINGS AT WESTMINSTER.

FLEWSTER *v.* ROYLE, WIDOW.

Tuesday, February 16.

TRESPASS and falſe impriſonment. Plea, *not guilty*.

—It appeared that on the 6th day of October laſt the defendant went to the place of rendezvous for the impreſs ſervice near the Tower, and gave information that there was a young man (meaning the plaintiff) at a houſe ſhe deſcribed, who was liable to be impreſſed, and who was a fit perſon to ſerve his Majeſty. In conſequence of this the plaintiff was ſeized by the preſs-gang and carried on board the tender, where he was detained, until it was diſcovered that he had never been in a ſhip before, except once when he had been in like manner wrongfully impreſſed.

If A. ſtates poſitively to the commander of a preſs-gang, that B. is liable to the impreſs ſervice, who in truth is not ſo, and B. in conſequence of this information, is impreſſed, A. is liable to an action of treſpaſs and falſe impriſonment at the ſuit of B.

Garrow, for the defendant, made two points: *1ſt*, that the action ſhould have been caſe and not treſpaſs; and *2dly*, that if the defendant gave the information *bonâ fide*, the action would not lie at all. He repreſented the public inconvenience which would ariſe from a contrary doctrine; as it was often of the utmoſt conſequence to the government of the country, that information ſhould be given where ſailors might be found to man our ſhips of war, and people would never give this information, if, though acting from the pureſt motives, they might ſuffer from an ignorance

of the niceties of the impreſs-law, which ſometimes perplexed men of great experience in Weſtminſter hall.

Lord ELLENBOROUGH.—This is not like a malicious proſecution, where the party gets a valid warrant or writ, and gives it to an officer to be executed. There was clearly a treſpaſs here in ſeizing the plaintiff, and the defendant therefore was a treſpaſſer in procuring it to be done.—Nor is any proof of malice neceſſary. If a perſon cauſes another to be impreſſed, he does it at his own peril, and is liable in damages if that perſon proves not to have been ſubject to the impreſs-ſervice. If the defendant in this caſe had ſaid, that ſhe *believed* the plaintiff was liable to be impreſſed, leaving it to the officer of the preſs-gang to make the neceſſary inquiries, and to act as he ſhould think moſt adviſeable—for ſuch a line of conduct, which a regard for the public ſervice would have induced her to adopt, ſhe would not have been amenable in this action. But ſhe took upon herſelf poſitively to aver that he was compellable to ſerve in a King's ſhip, and ſhe muſt therefore anſwer for the conſequences.

Verdict for the plaintiff.

The *Attorney General* and *Reader* for the plaintiff.

Garrow, *Park*, and *Eſpinaſſe* for the defendant.

[Attornies, *Biſhop* and *Allingham*.]

Vide Cooper *v.* Boot, 1 T.R. 6 T. R. 315. — Morgan *v.* Hughes, 2 T. R. 225 — Belk 535 *n.*—Storehouſe *v.* Elliott, *v.* Broad.

v. Broadbent, 3 T. R. 183— Philips v. Biron, Stra. 509— Barker v. Braham, 3 Wilſ. 368. Parſons v. Lloyd, 3 Wilſ. 341. Cameron v. Lightfoot, 2 Black. Rep. 1190.

WOODMAN *v.* CHAPMAN, WIDOW.

Same day.

A debt contracted by the wife before marriage ſurvives againſt her upon the death of her huſband.

IN this caſe it appeared, that the debt for which the action was brought had been contracted by the defendant before her intermarriage with her late huſband.—The point was taken, therefore, that his repreſentatives alone were liable for it.—But

Lord ELLENBOROUGH held that this debt, contracted by the wife before marriage, ſurvived againſt her upon her huſband's death; although during the coverture, in an action to recover it, he muſt have been joined for conformity.

The cauſe was afterwards referred.

Puller for the plaintiff.

Garrow for the defendant.

[Attornies, *Anſtice* and *Neale*.]

As a counterbalance to this liability, *choſes in action* belonging to the wife *dum ſola*, and not reduced into poſſeſſion by the huſband, do not go to his repreſentatives upon his death; and cauſes of

of action survive to the wife which accrued *during the coverture* in respect of her real estate, or for any personal wrongs done her. Com. Dig. tit. *Baron & Feme* (2 A.). Bac. Abr. tit. *Baron & Feme* (C) 3.—Upon the same principle, if the debts of the wife *dum sola*, are not recovered against the husband and wife in the lifetime of the wife, the husband cannot be charged for them either at law or in equity, after her death, should he have had ever so large a fortune with her. But if she leaves behind her any *choses in action*, these, although they belong to him as her representative, are to be considered as assets, in respect of which he will be chargeable for her debts. F. N. B. 121. Heard *v.* Stamford, 3 P. Wms. 409. Cas. Temp. Talb. 173 S.C.

Thursday, February 18.

FISHER *v.* SAMUDA AND ANOTHER.

2. Camp. 63. 7 Bing. 247.

Semble that where an action has been brought for the value of goods furnished at a stipulated price, and the purchaser does not, either in bar of the action, or to reduce the damages, object to the quality of the goods, but allows the seller to recover a verdict for the full price agreed upon, he cannot afterwards maintain a cross action on the ground of the goods being of a bad quality and unfit for the purpose for which they were ordered.

THE declaration stated, that in consideration that the plaintiff had undertaken to buy of the defendants a certain quantity of beer, to be shipped for Gibraltar, they undertook to furnish and deliver to him good and sufficient beer for that purpose:—Breach, that the beer furnished and delivered was bad, and wholly unfit to be shipped for Gibraltar; whereby the plaintiff not only lost the profit and advantage which he would have derived from the purchase of the said beer, but sustained great loss and damage on occasion of his not being able to sell and dispose of the same at Gibraltar aforesaid. There were other counts stating generally, that the beer was to be consigned beyond the seas; and on a warranty, that at the time of the sale it was *sound and good beer*.

Park,

2 Park. 314.
3 Camp. 452

Park, in opening the plaintiff's caſe, obſerved, that action had been before brought by the defendants gainſt the plaintiff for the price of the beer in queſtion, which judgment had been allowed to go by default, nd that on the execution of the writ of inquiry there as a verdict for the full price agreed upon. He admitd (although there were authorities to the contrary (*a*) hich might have miſled the plaintiff,) that the bad ality of the beer might have been ſet up as a defence the former action; but he contended that the plainF was at liberty to waive the defence which he might en have made, and to bring a croſs action for the each of the contract on the part of the defendants.

Lord ELLENBOROUGH.—It appears to me, that you ould have made your defence to the original action, d given in evidence the bad quality of the article pplied, either as an anſwer to the whole demand, or abatement of the damages. There was formerly opportunity to do final juſtice between the parties, nd why ſhould there now be a ſecond litigation?

Park argued that the plaintiff was not bound to reind the contract; that in truth it was not entirely void, s he had derived a certain degree of benefit under it; nd that he ought here to be permitted to recover for the ſpecial damage which he had ſuffered from it's not being fully performed by the defendants.

(*a*) *Vide* the caſes cited on the part of the plaintiff in Baſten Butter, 7 Eaſt, 479.

Garrow,

Garrow, contra, cited *Farnſworth* v. *Garrard*, *ante* 38, to ſhew that in whatever degree the beer was inferior, this might have been taken advantage of at the former trial, and maintained that no evidence of that ſort being then offered, the plaintiff had fully admitted the beer to be of the quality he had ordered.

Lord ELLENBOROUGH ſaid, the impreſſion of his mind was, that the preſent action could not be maintained; but that he ſhould ſuffer the cauſe to proceed, to ſave the expence and delay of coming down to trial again, ſhould the court be of a different opinion (*a*).

Evidence was then given that the beer was delivered in May 1806, to be ſhipped to Gibraltar in the following autumn; and that in July it was diſcovered to be of a bad quality and unfit for the purpoſe intended. To prove that the plaintiff had then deſired the defendants to take it back, a letter was called for, (under a notice to produce it,) ſuppoſed to have been written at that time by the plaintiff to the defendants, The letter not being produced, the plaintiff's letter-book, into which it had been copied in his own hand, was offered as ſecondary evidence of its contents, which, it was contended, muſt be admitted as ſufficient from the neceſſity of the caſe, as the defendants did not chooſe

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(*a*) Where there has been no ſpecial damage, and where the defects of the article are known when the firſt action is brought, *quære* whether the purchaſer is not precluded from bringing an action, the object of which is to recover back the purchaſe money, on the principle of the caſe of Bilbie *v.* Lumley, 2 Eaſt, 469?

to

to produce the original, and this was the only copy which had been preſerved.—But

Per Lord ELLENBOROUGH.—Where ſecondary evidence is let in, it is ſubject to the ſame rules as the beſt evidence which the caſe admits of. The evidence as to the contents of written inſtruments, when they cannot be produced themſelves, muſt be of a nature which the law would receive in other inſtances, and the purport of this letter muſt be proved by the teſtimony of ſome indifferent witneſs who took a copy of it, or who actually read it.

The earlieſt notice proved for the defendants to take back the beer was in December; previously to which the plaintiff had expoſed the caſks containing it to the open air in a court yard.

As ſoon as the purchaſer of good diſcovers that they do not anſwer the order given for them, he ought to return them to the vendor, or ſend him notice to take them back; and if he does, neither, he cannot afterwards maintain an action on the ground of the article being quite unfit for the purpoſes for which he ordered it.

Lord ELLENBOROUGH held that the plaintiff was precluded from objecting to the quality of the beer after having kept it ſo long. It was the duty of the purchaſer of any commodity, immediately upon diſcovering that it was not according to order and unfit for the purpoſe for which it was intended, to return it to the vendor, or to give him notice to take it back. Here, according to the plaintiff's own caſe, he knew certainly in July that the beer was unfit to be ſent to Gibraltar, and there is no evidence of his having intimated this to the defendants before December, when the ſeaſon for their exporting it was over, and when they might have loſt the opportunity of diſpoſing of it at home. Under theſe circumſtances the plaintiff muſt

be presumed to have assented to its being of a good quality, and to have acquiesced in the due performance of the contract on the part of the defendants(*a*).

The defendants had a verdict.

Park and *Bosanquet* for the plaintiff.

Garrow and *Lawes* for the defendants.

[Attornies, *Hunter* and *Langham*.]

(*a*) But where there has been an *express warranty*, an action may be maintained upon it, without either returning the goods or giving the seller notice to take them back. Fielder *v.* Starkin, 1 H. Bl. 17. Buchanan, *v.* Parnshaw, 2 T. R. 745. Still if the express warranty be coupled with an undertaking to take the article sold again, and pay back the money if *on trial* it shall be found to have any of the defects mentioned in the warranty, the buyer must, in such case, return the article as soon as he discovers any of those defects, in order to maintain an action on the warranty, Adam *v.* Richards, 2 H. Bl. 573; and even where there has been an express and absolute warranty, the purchaser must return the article warranted to the seller, and thereby rescind the contract of sale, before he can maintain an action for money had and received to recover back the price. Power *v.* Wells, Cowp. 818. Weston *v.* Downes, Doug. 23. Towers *v.* Barrett, 1 T. R. 133. *vide etiam*, Giles *v.* Edwards, 7 T. R. 181. Hunt v. Silk, 5 East, 449. Cooke *v.* Munstone, 1 New Rep. 351.

BOWDITCH *v.* MAWLEY.

Saturday, Feb. 20.

In covenant on a leaſe, a miſtake in the name of the perſon ſtated in the demiſe as *late tenant of the premiſes*, is a fatal variance.

COVENANT againſt the aſſignee of a leaſe, for non-payment of rent. Pleas, *non eſt factum*, and *riens in arrear*.

The declaration in reciting the demiſe in the deed, deſcribed the premiſes, as "all that meſſuage or dwelling houſe and tenement, ſituate, &c. then or late in the poſſeſſion or occupation of Mr. *Samuel* Richardſon as tenant thereof." In the indenture itſelf the late tenant's name ſtood, "Mr. *Saul* Richardſon."

Park for the defendant objected, that as *Saul* and *Samuel* were different names, and as the premiſes occupied by *Saul* Richardſon muſt be different from thoſe occupied by *Samuel* Richardſon, the indenture produced did not prove that the premiſes mentioned in the declaration had ever been demiſed by the plaintiff, or that there had been any covenant reſpecting them entered into by the perſon ſuppoſed to have aſſigned them to the defendant.

Lord ELLENBOROUGH inquired whether the names in the record or in the indenture were contracted; but finding that they were written at full length, he conſidered the variance fatal, and directed *a nonſuit*.

Garrow and *Lawes* for the plaintiff.

Park

Park and *Andrews* for the defendant.

[Attornies, *Orchard* and *Mowley*.]

Vide Wilſon *v.* Clark, 1 Eſp. Caſ. 273.—Briſtow *v.* Wright, Doug. 665.—Wilſon *v.* Gilbert, 2 Boſ. and Pul. 281.—Burbice *v.* Jakes, 1 Boſ. and Pul. 225.—It ſeems very extraordinary that in declaring on an indenture of leaſe the practice ſhould ſtill almoſt uniformly prevail, of unneceſſarily ſetting out the *parcels*, and reciting the material parts of the deed in letters and words, notwithſtanding the frequent nonſuits which are thus produced, and in ſpite of the repeated efforts of the courts to introduce the mode of ſtating only ſtance and legal effect deed. In Dundaſs *v.* Lo mouth, Cowp. 665, Lo field deſired the bar t note, that it is enough that the party demiſed *premiſes therein mentione* afterwards in Price *v.* Cowp. 727. where the de ſet out the leaſe at lengt Mansfield ſaid, "the nex of the kind that came b court, he would enquire w the declaration."

Same day.

DOE *ex d.* HANSON AND OTHERS *v.* SMITH AND ANOTHER.

In ejectment by deriſees of copyhold premiſes, to prove the admiſſion of the leſſors of the plaintiff, it is not only neceſſary to prove by the court-rolls, that perſons of th have been admitted, but evidence muſt be given of their identity,

EJECTMENT to recover the poſſeſſion of copyhold premiſes within the manor of Step

The leſſors of the plaintiff, claimed under the will of Iſaac Graham, by which he deviſed all his copyhold tenements and hereditaments to truſtees, for the uſe of his ſon Iſaac for life; remainder to truſtees for the life of his ſon Iſaac, to preſerve contingent remainders; remainder to the children of his ſon Iſaac, as tenants in common in tail; remainder to Mary, Thomas, and Rebecca Hanſon, his grand-children by his daughter, as tenants in common in fee. The leſſors of the plaintiff were Thomas Hanſon, and James Coates and Mary his wife, late Mary Hanſon.

Evidence being given of Iſaac Graham the elder's admiſſion as tenant in fee to the premiſes in queſtion in 1764; of his ſurrender to the uſe of his will in 1765; of the deviſe by his will in 1771; of his death in 1772; of the death of Iſaac the ſon, without iſſue in 1807; of the defendants being in poſſeſſion of the premiſes; and of Thomas Hanſon, and James Coates and Mary his wife being admitted as tenants in common;—

Lawes, for the defendants, objected, that it was ſtill neceſſary to give ſome evidence of the identity of the perſons admitted; ſince it did not as yet appear that, though bearing the ſame names, they were really the leſſors of the plaintiff.

Garrow, on the other ſide, contended, that *primâ facie* this muſt be taken to be the caſe, till the contrary was proved. The leſſors of the plaintiff were named in the will, and the preſumption was, that the perſons entitled were thoſe actually admitted.

Lord ELLENBOROUGH held, that proof of the identity of the perſons admitted muſt be given; otherwiſe there was not ſufficient evidence of the admiſſion of the leſſors of the plaintiff, and their title did not appear perfected, ſo as to enable them to maintain ejectment.

However, as his lordſhip was about to direct a nonſuit, a witneſs was found who had accompanied the leſſors of the plaintiff to the court baron when they were admitted.

Coates and wife went for a third, and *Hanſon* claimed two thirds,—one as deviſee, and one as heir to his ſiſter Rebecca, alleged to have died in her childhood; but there not being ſufficient proof of the marriage of Coates and wife, or of the death of Rebecca, there was a verdict for the plaintiff only as to one third, on the demiſe of Hanſon.

Garrow, *Marryat*, and *Campbell* for the leſſors of the plaintiff.

Lawes and *Bevan* for the defendants.

[Attornies, *Williams and Druce.*]

PURCEL,

PURCEL, SPINSTER, *v.* M'NAMARA, ESQ.

Monday, Feb. 22.

In an action for a malicious profecution, the plaintiff muſt give poſitive evidence of *the want of probable cauſe*, although the defendant dropped the proſecution, and did not appear when the indictment came on to be tried.

THIS was an action on the caſe for having maliciouſly, and without any reaſonable or probable cauſe, proſecuted the plaintiff for perjury.

In an equity ſuit between the ſame parties, the Lord Chancellor had decreed, that enquiries ſhould be made and accounts taken on the ſubject-matter of the bill; with the uſual direction, that all parties ſhould be examined upon oath (*a*). Under this decree the defendant had exhibited interrogatories for the examination of Miſs Purcell, the plaintiff, as to certain ſums of money alleged to have been advanced by him upon her account. To ground a petition to the Lord Chancellor, that the defendant might be injoined from interfering with her, while ſhe put in anſwers to theſe interrogatories, the plaintiff made an affidavit before a Maſter in Chancery, ſtating that the defendant had called upon her late at night when ſhe had been arreſted for debt at his ſuit and carried to a ſponging houſe, mentioning ſeveral threats that he had held out to her, and giving a minute deſcription of what had paſſed upon the occaſion. For ſuppoſed perjury in this affidavit an indictment was preferred againſt the plaintiff, which contained aſſignments of perjury upon ſome ſeemingly very immaterial parts of it, but likewiſe contained an aſſignment upon

(*a*) *Vide* 12 Veſey, jun. 166.

another part of it, in which she swore that he had desired her "to take care to clear his character in her answers, or she should be pilloried." The indictment was found by the grand jury for the county of Middlesex on the 13th of January, 1806, and the cause was entered for trial by Miss Purcell, at the sittings after Easter Term in that year. When the jury had been sworn, the prosecutor did not appear, and an acquittal took place as of course.

The plaintiff's counsel having now given in evidence an examined copy of the record of acquittal; and proved, that the defendant had instituted the prosecution; that the issue had been made up by Miss Purcell, and that the defendant had not only been solemnly called, but searched for, without being found before the verdict of *not guilty* was given;—there rested their case.

Lord ELLENBOROUGH.—Do you not mean to go farther, and shew *a want of probable cause?*

Topping answered, that he considered the non-appearance of the prosecutor at the trial, a sufficient *prima facie* case to throw upon the other side the burthen of proving that there *was* probable cause for the prosecution.

Lord ELLENBOROUGH.—There might have been probable cause for preferring the indictment, and still to have persisted in carrying on the prosecution might have been the greatest injustice. I am extremely unwilling to turn you round, particularly as this is the second

ſecond time the cauſe has come down to trial (*a*); but I am of opinion that you muſt give ſome evidence of the want of probable cauſe.—Can you point out any caſe, in which in an action like this, ſuch evidence has been diſpenſed with?

Topping allowed, that although he had looked into the books for the purpoſe, he had not been able to find any authority to that point; but contended that here expreſs proof was unneceſſary, as the want of probable cauſe might not only be inferred from the defendant having dropped the proſecution, but was in fact apparent on the very face of the indictment, the aſſignments for perjury being in general ſo trivial and ridiculous, that whichever way the truth was, there clearly could be no pretext for any criminal proceeding.

Lord ELLENBOROUGH,—The indictment muſt be taken all together; and certainly it does aſſign perjury on at leaſt one part of the affidavit which was material to the proceedings pending in the Court of Chancery, and which, if falſe, might have been a proper foundation for a criminal proſecution. To hold, then, that becauſe the proſecutor did not appear at the trial, no proof of the want of probable cauſe is requiſite on the part of the plaintiff, amounts to this, that there is a preſumption that every one, againſt whom an indictment is found, is indicted without any probable cauſe. But in Savil *v.* Roberts (*b*) it is laid down that if the

(*a*) 9 Eaſt, 157. (*b*) 1 Salk. 15.—1 Lord Raym. 381. S. C.

indictment be found by the grand jury, the defendant ſhall not be obliged to ſhew a probable cauſe, but it ſhall lie on the plaintiff's ſide to prove an expreſs rancour and malice. So in a caſe decided by Lord Kenyon, of which I have a MS. note (*a*), the ſame doctrine was held; and that deciſion, after great conſideration, was acquieſced in by the plaintiff's counſel. Indeed it muſt otherwiſe be contended, that however conſcientiouſly and properly a man may have acted in inſtituting a proſecution, if he afterwards drops it, upon finding he has been miſinformed, or that he has

(*a*) *Sykes one* &c. *v. Dunbar.* Sittings at Weſtminſter in K. B. after Michaelmas Term, 1799.

In an action for maliciouſly indicting plaintiff and three others for a conſpiracy, Lord Kenyon ruled, that it was not enough to ſhew that the firſt indictment preferred, which was ſtated to have been found *no true bill* was in fact ſo found, and that on the ſecond indictment, which was found by the grand jury, the plaintiff was acquitted *for want of proſecution;* but that the plaintiff muſt prove *actual malice* from other circumſtances. And upon the plaintiff's afterwards ſhewing that a ſuit brought by him in the Exchequer againſt the defendant, as the attorney for one of the ſuppoſed conſpirators as plaintiff in that ſuit, and in which the other ſuppoſed conſpirators were alſo intereſted, was properly brought; Lord Kenyon held, that this did not ſo far ſhew the want of probable cauſe for the indictment in queſtion, as to throw the burthen of ſhewing a probable cauſe on the other ſide; for he ſaid, it might ſo happen that the facts to be proved lay only in the knowledge of the defendant himſelf, and it would in its conſequences (if this evidence were held ſufficient to maintain the action) ſubject every man who ſhould indict for a perſonal injury to himſelf, of which he ſhould have no witneſs but himſelf, to an action for a malicious proſecution.—And hereupon Lord Kenyon, being about to nonſuit the plaintiff, a juror was withdrawn by conſent.

not ſufficient evidence to bring about a conviction, he muſt be taken to have proceeded maliciouſly and without any ſort of foundation. The abandoning of a proſecution may ariſe from the moſt honorable motives and the niceſt ſenſe of juſtice, inſtead of neceſſarily proving that the proſecution was wantonly and maliciouſly inſtituted; and the facts which juſtified the proſecutor's conduct may be known only to himſelf. Therefore, if an action is brought for the injury ſuſtained by a criminal proſecution, the burthen is thrown upon the plaintiff of ſhewing that there was no ground for imputing to him the crime with which he was charged. I feel great reluctance to ſtop the trial; but you muſt give evidence of ſome circumſtance from which the jury may infer the want of probable cauſe.

Topping ſaid he could carry it no farther: whereupon the CHIEF JUSTICE directed *a nonſuit.*

The *Attorney General* of counſel for the defendant then obſerved, that he had not refrained from taking the objection from any want of confidence in its validity, and that Mr. Juſtice Le Blanc had lately ruled the point the ſame way on the Weſtern Circuit (*a*).

Topping,

(*a*) *Incledon v. Berry and others.* Exeter Summer Aſſizes, 1805. Action for a malicious proſecution, in indicting plaintiff for perjury. The aſſignment of perjury was on evidence given by plaintiff on the trial of an appeal at the quarter ſeſſions for the county of Devon.

The plaintiff produced the record of acquittal, and proved that the defendants had abandoned

Topping, *Knapp*, and *Gurney* for the plaintiff.

The *Attorney General*, *Garrow*, and *Abbott* f defendant.

[Attornies, *Whitton* and *Chesham*.]

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closed the profecution. He likewife gave in evidence ſome expreſſions of the defendants, indicative of expreſs malice againſt him in this tranſaction, and there cloſed his caſe.

Le Blanc, *J.* required him to go farther and negative the exiſtence of probable cauſe.

Lens, Serjeant, for the plaintiff, contended, that it lay with the defendants to ſhew probable cauſe for having inſtituted the proſecution, after evidence of their having abandoned it, and having been actuated in the conduct of it by malice towards the plaintiff. But

Le Blanc, *J.* ruled, that ſome evidence (though, under the circumſtances, ſlight evidence would be ſufficient) muſt be given on the part of the plaintiff, of want of probable cauſe, before the defendants could be called upon for their defence.

Two witneſſes were then called by the plaintiff, who ſwore that they were preſent at the trial of the appeal, and that to the beſt of their recollection evidence was given by th tiff as that on which the was affigned.

Upon this the defendan called upon to go into th and they afterwards ga evidence of probable ca the plaintiff ſubmitted nonſuited.

Lord Ellenborough him previouſly held, that in action, the plaintiff is no ed from proving *the a probable cauſe*, by the ant, after commencing a p tion, having neglected to bill of indictment.

Wallis v. Alpine. Sittings after Trin. Term —Action againſt defend maliciouſly, and without p cauſe, charging plaintif aſſaulting him and brandi ſtick at him.—It appeared dence, that the defenda charged the plaintiff on before the lord mayor, v faulting him, and brandi

In the following term *Gurney* moved to ſet aſide this nonſuit, on the authority of *Parroll v. Fiſhwick*, Bul. N. P. 14, where it is ſaid, that if "the facts lie in the knowledge of the defendant himſelf, he muſt ſhew a probable cauſe, though the indictment be found by the grand jury, or the plaintiff ſhall recover without proving expreſs malice." He further contended that here it was for the defendant to prove that there was probable cauſe for preferring the indictment, as the facts were excluſively in the knowledge of himſelf and thoſe over whom he had an entire controul; and that his not appearing when the cauſe was called on for trial, was of itſelf a circumſtance to raiſe the preſumption of malice and the want of probable cauſe.—But the court were unanimouſly of opinion that, it was incumbent upon the plaintiff to give evidence of the want of probable cauſe; obſerving that if they were to hold that the mere circumſtance of the defendant's non-appearance at the trial was ſufficient, it muſt follow that every perſon who inſtitutes a proſecution, and ſees reaſon to drop it, is *primâ facie* a malicious proſecutor,—a ſuppoſition extremely dangerous to the

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ſtick at him; that a warrant had, in conſequence, iſſued againſt the plaintiff; that he had been apprehended upon it, and bound over by recognizance to the ſeſſions; that at the ſeſſions no indictment was preferred, and that the plaintiff was therefore diſcharged from his recognizance. There was no evidence to ſhew a want of probable cauſe, or that the defendant had acted maliciouſly. And Lord *Ellenborough* laid it down as law, that the mere non-proſecution of a charge, made on oath againſt another, was not ſufficient to maintain ſuch an action; and the plaintiff was non-ſuited.

criminal

criminal juſtice of the country, as well as perfectly unfounded, ſince the proſecution might have been both commenced and abandoned from the pureſt and moſt laudable motives. *Groſe J.* added that he had very frequently heard the law laid down in the ſame way by Lord *Mansfield*.—A rule to ſhew cauſe was therefore refuſed (*a*).

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(*a*) A ſlight degree of confuſion has ariſen upon this ſubject, from "*malice*" and "*want of probable cauſe*," being ſometimes conſidered as ſynonimous and interchangeable terms; but it is clear from an attentive conſideration of the caſes, that they are two diſtinct ingredients, which are both neceſſary to ſupport an action for a malicious proſecution. Although evidence be given of the defendant having been actuated by the moſt ranorous *malice*, the plaintiff muſt ſtill go on to give evidence of the *want of probable cauſe*. *Anonymous*, 6 Mod. 73. Golding *v.* Crowle, Bull. N. P. 14. Incledon *v.* Berry, *ſupra*. And to ſuch a degree is the public intereſted that under ſuſpicious circumſtances proſecutions ſhould be inſtituted, whatever may be the private motives of the proſecutor, that the rules of evidence have been very much relaxed to enable the defendant to prove that there was a probable cauſe, and ſo to ſecure his own impunity For this purpoſe proof of the evidence given by the defendant on the indictment has been received. Cobb *v.* Car. Bull. N. P. 14. And in one caſe where there was not any perſon preſent at the time when the ſuppoſed offence was committed except defendant's wife, Holt, C. J. held the evidence of the wife, given at the trial of the indictment, as good evidence to prove a felony having been committed. Johnſon *v.* Browning, 6 Mod. 216.—There appears to be this difference between "*malice*" and "*want of probable cauſe;*" that though they muſt both concur to ſupport the action, it is not always neceſſary to give poſitive evidence of "*malice*," but it may in ſome inſtances be inferred from "*want of probable cauſe.*" Sutton *v.* Johnſtone, 1 T. R. 545.—In Hunter *v.* French, Willes 520, the rule is laid down, "that

t where a perſon is acquitted jury, malice need not be ed at firſt on the part of the tiff; but that where the in- ment is quaſhed it is neceſſary rove expreſs malice." An- r diſtinction has been taken o the nature of the offence which the plaintiff was ged, viz. that where the in- ment was for *felony*, the de- lant cannot object that *ex- s malice* is not proved, but indictments for miſdemeanors lence of *expreſs malice* muſt given. Lilwal *v.* Smallman, *Hereford Summer Aſſizes*, 1753; Selwyn's Ni. Pri. 938. There is likewiſe this difference between "*malice*" and the "*want of probable cauſe*," that the one is a queſtion of fact, and the other a queſtion of law. Both muſt generally be ſubmitted to the jury; but when the facts to ſhew *a probable cauſe* are aſcertained, whether they amount to a defence or, not is to be decided by the judge. Smith *v.* M'Donald. 3 Eſp. Caſ. 7. Sutton *v.* Johnſtone, 1 T. R. 545. Golding *v.* Crowle, Bull. N. P. 14.

The BISHOP of DURHAM v. BEAUMONT.

Tueſday, February 23.

Evidence to ſupport the character of a witneſs is not admiſſible, unleſs fraud is expreſsly imputed to him.

HIS was an iſſue out of Chancery to try, whether previous to an agreement being entered into in the r 1791, between the preſent Biſhop of Durham and late Sir Thomas Blackett, Baronet, leſſee of certain d mines, the 9th part of the ore dug from which longs to the Biſhop, the agent of Sir Thomas ackett had repreſented to his lordſhip, that the ſum of 5*l.* was the *full annual value* of this 9th part, or at other repreſentation he had made on the occaſion.

A ſuit in equity being inſtituted to ſet aſide the agreent, this iſſue was directed, to aſcertain whether the aintiff had been miſled as to the value of his portion the ore by the agent of the perſon under whom the efendant now enjoys the mines, in right of his wife.

The

The converſation, the import of which was queſtioned, took place on the 17th or 18th of Auguſt 1791, between the Biſhiop and one Eraſmus Blackett, acting on the behalf of Sir Thomas, in the preſence of a Mr. Emme, the Biſhop's ſecretary. The only two witneſſes called, therefore, were Mr. Emme on the one ſide, and Mr. E. Blackett on the other.

The former ſwore that in anſwer to a queſtion from the Biſhop, Mr. E. Blackett ſaid, that the ſum of 925*l.* was *the full annual valūe* of the 9th part of the ore raiſed from the mines in queſtion; while this gentleman himſelf ſwore, that in anſwer to the ſame queſtion he ſaid, the ſum of 925*l.* was *a full equivalent* for the biſhop's 9th part, meaning that this was as much as the leſſee, who was at the expence of working the mines, could afford to pay, and more than the biſhop could make, by taking the ore in kind. The cauſe thus hanging upon the teſtimony of theſe two perſons,

The *Attorney General*, for the defendant, propoſed to call witneſſes to the character of Mr. E. Blackett. He contended that where fraud and falſehood were imputed to a witneſs, there his credit might be ſupported by evidence to his general character. And he cited as in point the caſe of *Doe ex dem. Stephenſon* v. *Walker*, 4 Eſp. Caſ. 50, where the queſtion being upon the validity of a will, and one of the atteſting witneſſes having ſworn that when the will was executed, the pen was put into the teſtatrix's hand, ſhe being then in a ſtate of ſtupid inſenſibility, and that in ſigning her name her hand was guided without her knowing what ſhe did

did, Lord Kenyon admitted evidence to the character of the two other ſubſcribing witneſſes; and it being ſworn that they were perſons of great reſpectability, who were deemed incapable of the miſconduct imputed to them, the jury found a verdict eſtabliſhing the validity of the will (*a*). Here a direct fraud was imputed to the witneſs, in having ſtated the 9th part of the ore to be greatly under its value, and in addition to that, he was charged with perjury in denying the falſe repreſentation he had formerly made. Therefore he came within the rule laid down by Lord Kenyon, and to enable the jury properly to appretiate his teſtimony, an opportunity ſhould be given to ſhew the character for veracity and integrity which he had always borne. For this purpoſe he offered to call Mr. Baron Wood, who then ſate on the bench beſide his lordſhip.

The counſel on the other ſide ſaid, they admitted Mr. E. Blackett to be a man of reſpectable character; they did not impute perjury to him, but only im-

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(*a*) The *Attorney General* added, on the authority of Mr. Jervis who was counſel in the cauſe, that another ejectment by the heir at law was brought in the court of Common Pleas, when the ſurviving atteſting witneſs having ſworn to the ſame effect, the ſame evidence was admitted by Lord Alvenley to the character of the two others, and the jury came to the ſame concluſion as to the will having been duly executed.—On the trial of firſt ejectment upon this will in the Common Pleas before Lord *Eldon*, evidence to the character of the deceaſed atteſting witneſſes was likewiſe admitted; although upon that occaſion the jury found a verdict in favour of the heir at law. Doe ex. d. Walker v. Stephenſon, 3 Eſp. Caſ. 284.

perfection

perfection of memory; and as they were prepared with ſimilar evidence in ſupport of their own witneſs, Mr. Emme, in caſe it had been admiſſible, they declined arguing the point of law.

Lord ELLENBOROUGH. There is here no caſe laid for admitting evidence to character. I fully accede to the doctrine laid down in *Doe on the demiſe of Stephenſon v. Walker*. There the atteſting witneſſes whoſe character was diſputed were dead, and it was properly held that the party claiming under the will ſhould have the ſame advantage as if they had been alive. In that caſe they muſt have been perſonally adduced as witneſſes, when their character would have appeared on their croſs-examination, and being dead, juſtice required that an opportunity ſhould be given to ſhew what credit was to be attached to their atteſtation of the will. In like manner, the court of King's Bench held in the time of Lord Mansfield, that evidence of the conduct of deceaſed witneſſes might be received, to attract credit to their teſtimony, or to deſtroy its effect (*a*). So in a caſe upon the northern circuit, in which I was myſelf counſel for the defendant, and which turned upon the validity of a falſe inſtrument (whether a deed or a will I forget) Mr. Juſtice Heath admitted as evidence, a confeſſion of the forgery, which compunction had drawn from one of the atteſting witneſſes *in extremis* (*b*). This confeſſion only ſupplied the place of what might have been obtained from

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(*a*) Wright ex. d. Clymer v. Littler. 3 Burr. 1245.

(*b*) *Vide* 6 Eaſt, 195.

croſs-

croſs-examination, had the witneſs ſurvived; and the propriety of admitting it was never queſtioned. But here, neither is the witneſs dead, nor is there any ſhade caſt over his character. Therefore in analogy to the caſe of Doe v. Walker, or of any other caſe ever determined in Weſtminſter-hall, there is no colour or pretence for admitting evidence to the character of the witneſs who has juſt been examined on the part of the defendant.

The jury found a verdict for the plaintiff, eſtabliſhing the fact, that 92 5*l.* had been repreſented *as the full annual value* of the biſhop's part of the lead ore.

Sir Samuel Romilly, *Topping*, *Martin*, *Marryatt*, and *Walton* for the plaintiff.

The *Attorney General*, *Garrow*, *Holroyd*, *Bell*, and *Raine* for the defendant.

[Attorneies, *Burley* and *Wilſon*.]

Vide Aveſon v. Lord Kinnaird, 6.—4 Eſp. Caſ. 51. S. C.—Bull. N. P. 296, 7. Peak, Law Ev. 6 Eaſt, 188. Goodright ex. d. Parr v. Hicks, Peak, Law Ev. 125, 6.

Same Day.

Rex v. Douglass.

Where the defendant being a porter delivered along with a *basket of fish* a false ticket denoting that 9s. 10d. instead of 6s. 6d. was to be paid for it; *held* that in an indictment for this offence, on 30 G. 2. c. 24. the basket of fish might be described as *a parcel*; but that if the indictment had been on 39 G. 3. c. 58, which enumerates *baskets, parcels*, &c. specifically, this would have been a fatal variance.

THIS was a prosecution for obtaining money under false pretences.—The indictment stated that defendant having in his custody and possession a certain parcel, to be by him delivered to Maria Countess Dowager of Ilchester, upon the delivery of which he was authorised and directed to receive and take the sum of six shillings and six-pence and no more, for the carriage and porterage of the same; yet that defendant produced and delivered to Thomas Harris, then being servant to the said Countess of Ilchester the said parcel, together with a certain false and counterfeit ticket, made to denote that the sum of 9*s.* 10*d.* was charged for the carriage and porterage of the said parcel, and unlawfully, knowingly, and designedly did falsely pretend to the said Thomas Harris, that the said false and counterfeit ticket was a just and true ticket, and that the said sum of 9*s.* 10*d.* had been charged and was due and payable for the carriage and porterage of the said parcel, and that defendant was authorised and directed to receive, and take the said sum of 9*s.* 10*d.* for the carriage and porterage of the said parcel: by means of which said false pretences, defendant did unlawfully, knowingly, and designedly obtain of and from the said Thomas Harris the sum of 3*s.* 4*d.* in monies, of the monies of the said Countess, with intent to cheat and defraud her of the same; whereas in truth and in fact, &c. — The principal witness was T. Harris the prosecutrix's servant, who stated that the

parcel mentioned in the indictment was a basket of fish; that the defendant, when he brought it, presented a ticket for 9*s.* 10*d.* which sum he received from the witness, who had since been been repaid by Lady Ilchester.

Lawes, contending that the indictment was upon stat 39. Geo. 3. c. 58, objected, first that this *basket* was not properly described as a *parcel*. That statute enacts that "if any porter or other person employed in the porterage or delivery of boxes, *baskets*, packages, *parcels*, trusses, game, or other things, shall take for the same a greater sum than the prices fixed, they shall forfeit for every such offence a sum not exceeding 20*s.* nor less than 5*s.*" *Parcel* therefore was not a generic name, and the indictment should have described the thing according to the fact.

Lord ELLENBOROUGH was of opinion that if the indictment had been upon the 39th of the king, this would have been a fatal variance: but it turned out to be upon 30 G. 2. c. 24. according to which, his lordship held, that a basket answered the general description of a parcel well enough.

If an indictment on 30 G. 2 c. 24, avers that the defendant, under false pretences obtained a sum of money, being the proper monies of A., and it appears in evidence that the money was obtained

Lawes next objected that the money obtained by the defendant appeared, not to be the property of the Countess Dowager of Ilchester as averred in the indictment. It never had been her's; and whether or not she was bound to reimburse her servant, this particular sum of 3*s.* 4*d.* was at the instant the sole property of T. Harris. Suppose it had been obtained feloniously,

from B. acting as A.'s ſervant, who had not *then* in his poſſeſſion any money belonging to A. but *afterwards* was repaid by him the ſum delivered to the defendant, this is a fatal variance. *Aliter*, if B. at the time had in his poſſeſſion a ſum belonging to A. equal to that delivered to the defendant.

in an indictment for the felony the property muſt clearly have been laid in him.

Gurney on the other ſide urged that T. Harris had on this occaſion been acting only as the agent of Lady Ilcheſter; that the intent was evidently to defraud her; and that ſhe actually had been defrauded, as ſhe had reimburſed the witneſs.

Lord ELLENBOROUGH held that her ſubſequent allowance did not make the money paid to the defendant her property at the time. She was not chargeable for more than was actually due for the carriage of the baſket, and it depended upon her whether ſhe ſhould pay the overplus.

The witneſs however afterwards ſwore that at the time of this tranſaction he had in his hands upwards of 9s. 10d. the property of his miſtreſs; which Lord *Ellenborough* conſidered ſufficient to ſuſtain the averment.

Sect. 39 G. 3. c. 58. is only cumulative in its proviſions, and does not take away the modes of puniſhing offences therein mentioned, which exiſted previouſly to the paſſing of the act.

Lawes laſtly contended that as this offence certainly came within the 39th of Geo. 3. the defendant ought to have been proſecuted on that ſtatute. But

Lord ELLENBOROUGH ſaid, that the remedy given by this ſtatute was cumulative, and did not take away the remedies which before exiſted either at common law or by other acts of Parliament.

The defendant was convicted.

Gurney

Garney and *Newbolt* for the profecution.

Lawes for the defendant.

[Attornies, *Hulme* and *Humphreys*.]

REX *v.* WATSON, ESQ.

Same day.

In an indictment for a libel, the poft-mark of a particular place within the county in which the venue is laid, upon a letter containing the libel, is not fufficient evidence of a publication there by the defendant.

THIS was an indictment for publifhing feveral libels on lieutenant General Gwynne, in the fhape of letters addreffed to that officer.

General Gwynne ftated in evidence, that he received one of the letters, mentioned in the indictment, at Windfor, with the *Iflington* two-penny poft-mark upon it; which when produced it appeared to bear.—An objection being taken, that as to this letter there was no proof of a publication in Middlefex,

Garrow for the profecution contended, that the poft-mark was *primâ facie* fufficient proof of its having been put into the poft-office at Iflington; as no one had authority to affix that poft-mark but the poft-maffer there.

Lord ELLENBOROUGH, however, held the proof of publication inufficient; as the poft-mark might have been forged.

If a libellous letter is ſent by the poſt, addreſſed to the proſecutor at a place out of the county in which the venue is laid in an indictment for the libel, ſtill if it was firſt received by him within that county, this is a ſufficient publication by the defendant to ſupport the indictment.

Another letter addreſſed to Windſor the proſecutor had received by the poſt at his apartments in the King's-Mews in town.

Marryat objected, that although if the letter had been received by the proſecutor at Windſor, this would have been a publication by the defendant in Berkſhire, there was no reaſon for ſaying it was through his agency that it had been publiſhed at the King's Mews, a place to which he had never ſent it.—But

Lord ELLENBOROUGH conſidered the receiving of this letter there ſufficient proof of its publication in Middleſex; as the defendant, having once put it in circulation, muſt be taken to have publiſhed it in that place, in which it was delivered to the perſon to whom it was addreſſed.

Upon the counts containing this and other libellous letters, the defendant was found *guilty*.

Garrow, *Jekyl*, and *Andrews* for the proſecution.

Marryat for the defendant.

[Attornies, *Seton*, and *Dennett & Co.*]

Vide Rex *v.* Johnſon, 7 Eaſt. 169. Eaſt. P. C. 1120. S. C. 6c. Girdwood's caſe, 1 Leach, Eſſer's Caſe, Eaſt. P. C. 1125.

VII.

WILLAUME *v.* GORGES.

Same day.

The presumption arising from lapse of time, of a judgment being satisfied, is not rebutted by evidence of the defendant having been in extremely embarrassed circumstances, and in the opinion of those who knew him, incapable of paying the debt secured by the judgment.

THIS was an issue out of Chancery to try whether there was any thing due upon a judgment entered up of Hilary Term, 1769, to secure the payment of an annuity. The circumstances given in evidence to rebut the presumption of satisfaction from lapse of time were, that the person who was the grantor of the annuity and defendant in the judgment, soon after 1769 left the country, from the deranged state of his affairs; that in 1776 he executed a trust deed at Calais, in which the grantee's name appeared as a creditor; that he re-visited England at intervals under different feigned names; that he died in London under a feigned name in 1797; and that in the opinion of his most intimate friends, in the interval from 1776 to his death, he never had the means of satisfying the judgment in question.—But there was no proof of any payment, or of any sort of acknowledgment subsequently to the year 1776.

Lord ELLENBOROUGH thought, that under these circumstances the inference to be drawn from lapse of time was not rebutted, and directed the jury to presume that the judgment had been discharged by being paid off or released.

There was therefore a verdict for the defendant, negativing the existence of any debt upon the judgment,

Garrow and *Marryat* for the plaintiff.

The *Attorney General* and *Abbott* for the defendant.

[Attornies, *Mountfort* and *Townsend.*]

Vide Colfell *v.* Budd, *ante* 27.

Same Day.

MORRIS, ESQ, *v.* BURDETT, BART.

A candidate at an election of members of parliament is not liable for any part of the expences of the election, except by positive ſtatute or his own undertaking, notwithſtanding a long uſage for the expences being rateably defraid by the candidates. But a candidate to repreſent a city or a borough in parliament is liable for a ſhare of the expence of adminiſtering oaths to Roman Catholic electors under 34 G. 3. c. 73. and if he makes uſe of huſtings, erected by the returning officer, for the accommodation of himſelf or his agents, a promiſe on his part will be inferred to contribute to the expence of erecting them.

ASSUMPSIT for work, and labor, and materials found; with the common money counts.

The action was brought by the High Bailiff of Weſtminſter againſt the defendant, who was returned to parliament as one of the repreſentatives for that city at the laſt general election, to recover from him a proportion of the expences then incurred by the plaintiff as returning officer.—The following were the principal items in the particular of the plaintiff's demand, to which the defendant was required to contribute;

	l.	*s.*	*d.*
Six under-bailiffs to attend proclamation of election - - -	6	6	0
High Conſtable's attendance -	1	11	6

Cryer,

Cryer, for proclamation and horſe-hire - - -	5	15	6
24 Poll-clerks, at 21*s.* and 5*s.* each	468	0	0
24 Staff-men at 7*s.* 6*d.* and 2*s.* 6*d.* each - - - -	180	0	0
Table for High-Bailiff, Deputy, &c.	120	0	0
2 Commiſſioners for adminiſtering the oaths of allegiance, &c. at 21*s.* and 5*s.* - - -	39	0	0
Bill for erecting huſtings and ſurveyor's fee for valuing ſame	553	10	10
Bond of indemnity to church-wardens of St. Paul, Covent-Garden, and incidental damages -	40	0	0
Printer's bill for tickets, &c.	14	3	6
The ſum total amounted to	1507	0	0

The election took place in May, 1807, when five candidates were propoſed, viz. Right Hon. Lord Cochrane, the Right Hon. R. B. Sheridan, Sir Francis Burdett, Bart. the defendant, John Elliott, Eſq. and James Paul, Eſq. This laſt gentleman however withdrew early in the conteſt, and paid 200*l.* as his ſhare of the expences then incurred. The defendant was afterwards called upon for the ſum of 326*l.* 15*s.* being the fourth part of the 1307*l.* which remained to be divided between himſelf and the other three candidates; but refuſed to pay any part of it, on the principle that a member of parliament ſhould be elected free from all expence.

It was admitted or proved, in the courſe of the trial, that the charges were exactly ſuch as had been made on ſimilar occaſions, as far back as could be remembered; that the ſums mentioned in the particular had been diſburſed by the plaintiff; that the defendant was confined to his bed by illneſs during the whole election; that before the poll began, a Mr. Percy, on the part of a committee of electors in the intereſt of the defendant, informed the plaintiff that no part of the expence of the election would be defrayed by Sir Francis or his friends (*a*), but required him to ſupply them with tickets for the huſtings; that the inſpectors and poll-clerks, acting in the intereſt of the defendant, had the ſame accommodation and privileges during the election as thoſe of the other candidates; that a requiſition was made by Lord Cochrane for adminiſtering the preſcribed oaths to Roman Catholics, upon which commiſſioners were appointed for that purpoſe; that the defendant upon

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(*a*) Mr. Percy at the ſame time delivered to the plaintiff, as his authority for this application, a minute of a reſolution of the committee, of which the following is a copy:

At a meeting of the Committee of electors of Weſtminſter, friends of Sir Francis Burdett, Bart. held at the Britannia Coffee-Houſe, Covent-Garden, on Wednesday the 5th of May, 1807.

Mr. Francis Place in the Chair.

Reſolved,

That Mr. Percy do wait upon the high bailiff, to requeſt the neceſſary tickets for the huſtings, and that Mr. Percy do likewiſe officially appoint the inſpectors and check-clerks.

FRANCIS PLACE.

the

the meeting of parliament took his ſeat in the Houſe of Commons; and that the office of High Bailiff was purchaſed for a conſiderable ſum of money by the plaintiff.

The *Attorney General* contended, that under theſe circumſtances the plaintiff was entitled to recover to the full extent of his demand. From the antiquity and notoriety of the different charges a promiſe might be inferred on the part of every candidate to ſubmit to them. The preſent defendant might not have perſonally interfered pending the election; but by ſubſequently taking his ſeat in the Houſe of Commons, he had acceded to the character of a candidate, and adopted the acts of his committee.—The items in themſelves could not be conſidered as unreaſonable. Without the attendance of the ſtaff-men and conſtables, it was impoſſible that the peace of the metropolis ſhould be preſerved during the tumult of the election; and the whole of the clerks charged for were indiſpenſably neceſſary to the taking of the poll. The huſtings, if not equally neceſſary, at leaſt contributed greatly to the convenience of the candidates as well as of the electors, and tickets of admiſſion to them had been expreſsly required by the defendant's agent,—which likewiſe rendered him liable for a ſhare of the printer's bill. The bond of indemnity to the church-wardens of the pariſh of St. Paul, Covent-Garden, had always been required by them, before they would grant permiſſion to erect the huſtings in the uſual place, near the church. As to the charge for commiſſioners to adminiſter oaths to Catholics,

there could be no ſort of doubt; it being enacted by ſtat. 34 Geo. III. c. 73. that ſuch commiſſioners ſhall be provided, upon the requiſition of any one of the candidates, and that the expence ſhall be defrayed by all the candidates in equal proportions.

Garrow on the other ſide maintained that there had been no aſſent on the part of the defendant, either expreſs or implied, to be anſwerable for any part of theſe expences. Particular items he did not object to, denying his liability altogether. The defendant had himſelf been too ill during the whole of the election to know what was going forward; nor could he be conceived to have acceded to the acts of his committee by taking his ſeat in the Houſe of Commons, which he was bound and might have been compelled to do, after being legally returned as one of the repreſentatives of the people in parliament. But the High Bailiff had received an expreſs warning that he was to expect no contribution towards the expence of the election from Sir Francis Burdett or his friends; and thus was the idea of an implied undertaking completely negatived.—The ſtatute concerning the Catholic oaths ſeemed to apply only to county elections; but even ſuppoſing the candidates were liable upon this ſcore, the defendant could not be conſidered as a candidate within the meaning of the legiſlature; as his being propoſed was entirely without his knowledge or conſent, and this burthen might as well be thrown upon any obſcure individual, ſtarted by ſome elector againſt his will, for the mere purpoſe of haraſſing and oppreſſing him.

Lord

Lord ELLENBOROUGH.—A candidate at an election for members of parliament is liable to no expence except ſuch as the ſtatute law caſts upon him, or he takes upon himſelf by his expreſs or implied conſent. A great number of theſe items may therefore be entirely laid out of conſideration, as ariſing from acts which the plaintiff was bound to do by reaſon of his office, or as of ſuch a nature that no promiſe to contribute to them can poſſibly be inferred.—To proclaim the election is a duty which the law impoſes upon the High Bailiff, and there is the leſs pretence for charging the candidates with it, as they had not then been nominated. It does not ſeem neceſſary that he ſhould have been attended on the occaſion with ſix under-bailiffs, the crier on horſe-back, &c. but if it was, he muſt conſider the conſequent expence a burthen he took upon himſelf along with his office; which muſt be a lucrative one, from the terms on which it was purchaſed.—So the law requires him to do whatever is neceſſary to making the return; and if the election cannot take place without the attendance of ſo many ſtaff-men and poll-clerks, he alone muſt retain and pay them. The charge for the High Bailiff's table, however long eſtabliſhed, cannot be ſuſtained, and is without any colour of juſtice.—For a ſhare of the expence incurred in adminiſtering the oaths to the Roman Catholic electors the defendant appears to be liable, if he ſhall be conſidered as having acceded to the character of a candidate. But the ſtatute, while it caſts this burthen upon the candidates, regulates the amount of the compenſation to be given to the commiſſioners, and enacts that the returning officer ſhall provide commiſſioners *at a ſum not*

not exceeding one guinea per day for adminiſtering ſuc oaths. Therefore this item muſt be reduced to tha amount.—The defendant's liability as to the huſtings will depend upon whether he has in any manner under taken to defray a part of the expence of erecting them In county elections the ſheriff is required to erec huſtings, to be paid for by the candidates; bu this act does not extend to cities or boroughs, an the returning officer here might have taken th poll either in the Guildhall, Weſtminſter, or i the open air. Still, however, the candidates ma make themſelves liable for the expence of the huſtings and if Percy had authority from the defendant to d mand tickets, I think the defendant is liable in th inſtance. If Percy had no ſuch authority, then muſt be conſidered whether a promiſe may be infer from the defendant's ſilence upon the ſubject, an his agents having conſtantly made uſe of the huſtings If it is to be taken that Percy had no authority from the defendant to beſpeak the tickets, then he cannot be looked upon as the defendant's agent to warn the plaintiff that no part of the expence of the election would be defrayed by him; the proteſt was idle, and no notice of the kind ſuppoſed was ever given. In that caſe the circumſtance of the defendant's agents having uſed the huſtings ſeems entitled to ſome weight; for though a candidate at ſuch an election may remain without ſide the huſtings, and require the peace to be kept yet if he uſes the huſtings for the accommodation of him ſelf or his agents, he muſt be preſumed to promiſe to pay a part of the expence of erecting them; he muſt take the burthen with the beneſit. With the bond of in demnit

dennity I think the defendant can have nothing to do; as there was no occaſion to hold the election where there was danger to the church of St Paul, Covent Garden: but if he acceded to the character of a candidate, then he is liable for his ſhare of the printer's bill, which is ſtated to be for printing tickets of admiſſion to the huſtings, and the forms of certificates required by the act of parliament concerning the adminiſtering of the oaths to Roman Catholics.—Whether the defendant had taken upon himſelf the character of a candidate, and adopted the acts of his committee, his lordſhip left as a queſtion of fact with the jury.

Verdict for the plaintiff, with 117*l.* 8*s.* 2*d.* damages, being one-fifth of the charges for huſtings, and ſpecial commiſſioners, and a ſmall portion of the printer's bill.

In the following term *Clifford* moved for a rule to ſhew cauſe why this verdict ſhould not be ſet aſide; contending that a candidate at an election of members of parliament cannot be liable for any part of the expences except by poſitive ſtatute; that an officer charged with the execution of a writ cannot legally take any thing for executing it; that even an epxreſs promiſe to a returning officer to pay him part of the expences of the election would be void; that all thoſe things, in reſpect of which the charge was here made upon the defendant, had been done by the plaintiff in the execution of his duty; that it was for him alone to fix the place of election, at which the candidates and electors were bound to attend; that if he choſe to erect booths or huſtings for conducting the

election

election with more convenience, he could not throw the expence upon the candidates; and that the act rendering the candidates at county elections liable for the huſtings when erected at their requeſt, ſhewed there could be no ſuch liability at common law.

THE COURT, however, (after hearing the whole of Chief Juſtice's charge to the jury read from the note of a ſhort hand writer,) were of opinion that his Lordſhip's direction was right; that the items for which the defendant was charged had nothing to do with the execution of the writ for the election of members of parliament; that the huſtings were to be conſidered as any other building in the neighbourhood of the place of election of which the defendant had availed himſelf; that if his agents had demanded tickets for the huſtings and he had ſanctioned their acts, (points left to the jury,) he muſt take a part of the burthen along with the convenience; and that the whole caſe had been properly put upon the ground of the defendant's adopting the character of a candidate, and thereby aſſenting to what had been done by his committee. —*Clifford* therefore took nothing by his motion.

The *Attorney General*, *Park*, and *Richardſon*, for the plaintiff.

Garrow, *Marryat*, and *Clifford*, for the defendant.

[Attornies, *Dewes & Co.* and *Devis.*]

Vide Stotesbury v. Smith, Cro. Eliz. 123.—Budge v. Cage, 2 Burr. 924, Black. Rep. 204 Cro. Jac. 103.—Jermyn v. Lucas, S. C.—Barkly v. Kempſtow, Trials p. Pais, 181.

N. The

N. The uſage in Weſtminſter has hitherto been for the High Bailiff to procure an expreſs promiſe from the candidates, by calling upon them before their nomination to ſign an agreement in the following form:—

To A. B. Eſq. High Bailiff of the City and Liberty of Weſtminſter.

We, whoſe names are hereunto ſubſcribed, candidates to ſerve in Parliament at the election for the city and liberty of Weſtminſter, do hereby authoriſe and deſire the ſaid High Bailiff, or his Deputy, to find and provide ſufficient clerks, porters, &c. and alſo to find and provide a table for the High Bailiff, his Deputy, and Officers, (the charge of which not to exceed 10 guineas per day,) and to take every neceſſary ſtep for the conducting and ordering the ſaid election, until two candidates ſhall be returned by a majority of electors of the ſaid city and liberty; and we do hereby promiſe and agree to pay to the ſaid High Bailiff, or his Deputy, all expences of the ſaid election. Witneſs our hands, &c.

WATHERELL *v.* HOWELLS.

Friday, Feb. 26.

THIS was an action on the caſe in the nature of waſte, at the ſuit of the reverſioner of a piece of garden-ground, in the pariſh of Fulham, againſt his late tenant for ploughing up certain ſtrawberry beds.

It is waſte for an outgoing tenant of garden-ground to plough up ſtrawberry beds in full bearing, although when he entered he paid for them on a valuation to the perſon who occupied the premiſes before him, and although it may have been uſual for ſtrawberry beds to be appraiſed and paid for as between outgoing and incoming tenants.

The defendant's term expired at Lady-day 1807, and it was proved that in the preceding autumn he had ploughed up two acres of the ground he held under the plaintiff, laid out in ſtrawberry beds, for the purpoſe of ſowing it with turnips. The annual profit of the ſtraw-

berries,

berries produced by theſe beds had been about 60 and they were in full bearing at the time when the were ploughed up.

The defence was, that the ſtrawberry roots whic had been grubbed up were the property of the d fendant, and that he had a right to diſpoſe of them a he thought fit.

In ſupport of this, evidence was given of a genera practice of appraiſing and paying for ſtrawberry bed as between an in-coming and out-going tenant; and th fact was eſtabliſhed that the defendant had paid to th perſon who aſſigned to him the leaſe of the ground ſum of money for theſe very ſtrawberry beds, whic were valued to him with the other ſtock upon th premiſes.—But

Lord ELLENBOROUGH ſaid, that though by cuſt the tenant might remove ſome things which by t general law, as affixed to the freehold, belonged to t landlord, this could never extend to enable him ſterilize the ſoil. Strawberry beds might have bee appraiſed in the manner deſcribed, becauſe peopl rather than ſuffer miſchief from another, would ſom times pay him a ſum of money to obſerve the la The queſtion here was, whether the thing conplained c had been wrongfully and unjuſtly done to the preju dice of the plaintiff. The taking up ſtrawberry roo was not neceſſarily in itſelf an injury to the inheritanc for which an action would lie; but if the defendant i this inſtance ploughed up the beds before they were ex

hauſted, and without having any reaſonable object in view, he had certainly prejudiced the plaintiff's reverſionary eſtate, and it could ſcarcely be doubted that he did ſo wrongfully and maliciouſly.

It was then agreed between the parties that, as the object of the action was to reſiſt a claim of right ſet up by the defendant, there ſhould be a verdict for the plaintiff, with only 20*l.* damages.

The *Attorney-General*, *Holroyd*, and *Comyn* for the plaintiff.

Garrow and *Marryat* for the defendant.

[Attornies, *Cobb* and *Impey*.]

Vide Penton *v.* Robart, 2 Eaſt, 38.—Dean *v.* Allalley, 3 Eaſt, 88.—Elwes *v.* Maw, 3 3 Eſp. N. P. Caſ. 11.

SOLOMON *v.* UNDERHILL.

Same day.

If a party coming to attend the trial of his cauſe, is arreſted, the Judge at niſi prius will grant a *habeas corpus* to diſcharge him; and will put off the trial until he is releaſed, without payment of coſts, if any colluſion can be ſhewn to exiſt between the oppoſite party and the creditor who arreſted him; otherwiſe, only upon payment of coſts.

WHEN this cauſe was about to be called on,

Garrow, for the defendant, ſtated, that as his client was coming down to attend the trial, he had been arreſted and carried to a ſpunging houſe. He therefore

prayed the interference of the court for the defendant's discharge, and that the trial might ſtand over until he could be preſent.

Park, on the other ſide, contended, that the defendant was not previleged from arreſt on this occaſion, as he was coming voluntarily, and not like a witneſs in obedience to a ſubpœna, and that the cauſe might be tried perfectly well in his abſence, from the inſtructions he had no doubt given to his counſel and attorney.—At any rate, as the plaintiff was not at all in fault, his Lordſhip would not put off the trial to accommodate the defendant, except upon payment of coſts.

Lord ELLENBOROUGH ſaid, that a party wiſhing to attend the trial of his cauſe, and to inſtruct his counſel, was privileged from arreſt *eundo, morando et redeundo*; and that he would immediately grant his *habeas corpus* to bring up the defendant to be diſcharged; but that he could only put off the trial *on payment of coſts*, unleſs ſome colluſion ſhould be ſhewn to exiſt between the plaintiff and the creditor who had arreſted the defendant.

The offer of putting off the cauſe till the following day, on theſe terms, was declined, and the trial proceeded.

Vide Mackins *v.* Smith, 1 H. Bl. 636, in which it was held, that all perſons who *have a relation to a cauſe* which calls for their attendance in court, and who attend in the courſe of that

that cauſe, though not compelled by proceſs ſo to do, are privileged from arreſt, provided their attendance be not for any unfair purpoſe. So it has been determined, that the party to a cauſe is privileged from arreſt, attending an arbitrator to be examined as a witneſs, under a rule of court.—Spence *v.* Stewart, 3 Eaſt, 89.—*Vide etiam* Lightfoot *v.* Cameron, 2 Bl. Rep. 1113.—Arding *v* Flower, 8 T. R. 534.—Kinder *v.* Williams, 4 T. R. 377.—Peak. Law Ev. 193.—Tidd's Prac. 173, 4. 4th ed.

GOODES *v.* WHEATLY, ESQ.

Same day.

In an action for falſe impriſonment, the declaration averred that plaintiff was a conſtable of a particular pariſh, and in the due execution of his ſaid office as ſuch conſtable; but it appeared that though a conſtable inhabiting and acting in this pariſh, he was elected by the leet jury, and ſworn in to ſerve for a whole liberty, of which the pariſh formed a part; *held* to be a fatal variance.

THIS was an action of treſpaſs and falſe impriſonment. The declaration ſtated that plaintiff, on the 4th day of June A. D. 1807, was a conſtable of the pariſh of St. Paul Covent Garden, in the city of Weſtminſter, in the county of Middleſex, and that defendant, together with certain perſons, being the ſervants of him, defendant, on the ſaid 4th day of June, at Weſtminſter aforeſaid, with force and arms, &c. made an aſſault on plaintiff, he being then and there in the due execution of his ſaid office as ſuch conſtable as aforeſaid, and then and there beat, bruiſed, wounded, and ill treated him, &c. There were two other counts, both of which referred to the above deſcription of the Plaintiff's office, and laid the aſſault to have been committed upon him in the due execution of the ſaid office.

The plaintiff's alleged caſe was, that while doing duty as a conſtable at St. James's palace laſt King's Birth-day, he had occaſion to deſire the defendant, a

lieutenant-colonel in the guards, but then out of uniform, to walk on; when the latter marched him off to the guard room, under a file of grenadiers, and confined him there ſeveral hours.

To prove the plaintiff to have been a conſtable at the time, his appointment was given in evidence; from which it appeared that he had been preſented by the Leet Jury of the Liberty of Weſtminſter, as a fit perſon to ſerve as one of the conſtables of the pariſh of St. Paul Covent Garden, and that he had been afterwards ſworn in, to ſerve for the City and Liberty of Weſtminſter.

The *Attorney General* contended, that the plaintiff's office was improperly deſcribed in the declaration, and that he muſt therefore be nonſuited.

Garrow, on the other ſide, anſwered, that the plaintiff actually was a conſtable of the pariſh of St. Paul Covent Garden. Had the expreſſion been "*for* the pariſh," it might have been a fatal miſdeſcription. Though theſe conſtables were *de facto* ſworn to ſerve for the City and Liberty, they might not improperly be ſtated to be conſtables *of* the pariſh as inhabitants of which they were preſented to ſerve by the leet. At any rate the objection was upon the record.

Lord ELLENBOROUGH.—The objection riſes out of the evidence; for, merely looking to the record, *non liquet* that this pariſh may not be a diſtrict having a conſtable of its own. Then the declaration ſtates that

the plaintiff was conſtable of the pariſh of St. Paul Covent Garden, and that the defendant made an aſſault upon him in the due execution of his ſaid office, as ſuch conſtable. But it appears that he was ſworn in to ſerve for the City and Liberty of Weſtminſter, and, indeed, he was in the pariſh of St. James's when the aſſault took place. It is to be regretted that a count for a common aſſault, which is ſo often unneceſſarily introduced, was omitted here.

Plaintiff nonſuited.

Garrow and *Eſpinaſſe* for the plaintiff.

Attorney General and *Newbolt* for the defendant.

[Attornies, *Harriſon* and *Dyneley*.]

Vide 2 Hawk. P. C. 62.—Bac. Abr. tit. Conſtable, A.

HODGSON *v.* LE BRET.

Same day.

IN an action for goods ſold and delivered, the plaintiff's witneſſes ſtated, that the defendant, Madame Le Bret, came to his ſhop and purchaſed of him a piece of Iriſh linen, and ſeveral pieces of muſlin at ſeparate prices; ſhe

If the purchaſer of goods, at the time of the ſale, write his name upon a particular article, with intent to denote that he has purchaſed it, and to appropriate it to his own uſe, this is enough to take the ſale, as to the article written upon, out of the ſtatute of frauds, but not as to other articles bought at the ſame time.

wrote her name upon the linen at the time; but the muſlin was not then produced; none of the goods were ſent home to her till ſome months after, when ſhe refuſed to accept of them; ſaying that ſhe had not bought them. As her converſation with the plaintiff was carried on in French, which the witneſſes did not perfectly underſtand, they could not ſpeak with certainty as to her intentions in marking her name upon the linen.

Park, for the defendant, contended, that the contract was void, under the 17th ſection of the ſtatute of frauds, being for the ſale of goods above the value of 10*l.* and the buyer not having accepted any part of the goods ſold, nor given any thing as earneſt to bind the bargan, and there being here no memorandum in writing ſigned by the parties or their authoriſed agents.

Garrow, on the other ſide, maintained, that the circumſtance of the defendant having written her name upon the linen at the time of the ſale, took the caſe completely out of the ſtatute.

Lord ELLENBOROUGH held, that this would be ſufficient as to the linen itſelf, if the defendant's purpoſe in writing her name upon it was, thereby to denote that ſhe had purchaſed it, and to appropriate it to her own uſe; but that as nothing had been written on the muſlins, and as they had not even been produced to the defendant along with the linen, the ſale as to them was clearly void by the ſtatute.

The

The cauſe was afterwards referred.

Garrow and *Adolphus* for the plaintiff.

Park and *Rowlat* for the defendant.

[Attornies, *Brace* and *Wingfield.*]

Anderſon v. *Scot*. Sittings after E. T. 1806.

Special aſſumpſit for the non-delivery of wine bought by the plaintiff of the defendant. It appeared that the plaintiff went into the defendant's cellar, and ſelected ſeveral pipes of wine, for which he agreed, by parol, to pay a certain price: the *ſpills*, or pegs by which the wine is taſted, were then cut off; plaintiff's initals were marked on the caſks by defendant's clerk in his preſence, and plaintiff took the gauge numbers. It was objected that this ſale was within the ſtatute of frauds; but Lord ELLENBOROUGH held, that the cutting off the ſpills, and the marking of plaintiff's initals on the caſks by defendant's agent, in the preſence of all the parties, amounted to a *delivery*.—It was then contended that this proved the contract laid in the declaration to have been performed. The plaintiff complained of the non-delivery of the wine; whereas he had himſelf proved that it had been delivered. As to which, Lord Ellenborough obſerved, that although there had been an incipient delivery, ſufficient to take the caſe out of the ſtatute of frauds, yet that delivery not having been perfected, plaintiff had a right to an action in the preſent form, to recover damages for the non-completion of the contract.

If the purchaſer deals with the commodity as if it were in his actual poſſeſſion (as by ſelling a part of it to another perſon) this will ſuperſede the neceſſity of proving actual delivery, in an action brought againſt him to recover the value of it. Chaplin *v.* Rogers. 1 Eaſt, 192. A written order given by the ſeller of goods to the buyer, directing the perſon, in whoſe care the goods are, to deliver them, has likewiſe been held ſufficient evi-

dence of a delivery, within the meaning of this ſtatute.—Searle *v.* Keeves, 2 Eſp. Caſ. 598. So where a ſample is delivered to, and accepted by the purchaſer, and ſuch ſample is to be accounted for as part of the commodity ſold, that will take the caſe out of the ſtatute. Hinde *v.* Whitehouſe, 7 Eaſt, 558. And generally, where goods are ponderous and incapable of being handed over from one to another, there need not be an actual delivery; but it may be done by that which is tantamount, ſuch as the delivery of the key of the warehouſe in which the goods are lodged, or by delivery of other indicia of property. Per Lord Kenyon, C. J. 1 Eaſt, 195.—As to what ſhall be a ſufficient *memorandum in writing* under this clauſe, *vide* Egerton *v.* Mathews, 6 Eaſt, 307.—Champion *v.* Plummer, 1 New. Rep. 252.—Knight *v.* Crockford, 1 Eſp. Caſ. 190.—Saunderſon *v.* Jackſon, 2 Boſ. & Pul. 238.—No caſe ſeems as yet to have occurred as to what ſhall be ſufficient as *earneſt* to bind the bargain.

ADJOURNED

ADJOURNED SITTINGS IN LONDON.

BAINBRIDGE AND ANOTHER *v.* NEILSON.

Saturday, February 27.

THIS was an action on a policy of insurance in the ship Mary and her freight, at and from Jamaica to Liverpool.

If the owner of a ship insured hears that she is captured, and thereupon gives notice of abandonment to the underwriters, the abandonment stands good, and he may proceed as for a total loss, if she was actually once captured, although he knows of her being recaptured before action brought.

The only question was, whether, under the following circumstances, the assured were entitled to come upon the underwriters for a total, or only for an average loss.

On the 1st of October 1807, the plaintiffs having heard a report of their ship being captured by the Spaniards, on her voyage home, gave notice of abandonment to the underwriters. On the 2d the intelligence was confirmed by the arrival of part of her crew as passengers in another vessel. On the 6th of October a letter was received from the Captain, stating, that the Mary had been captured on the 21st of September; but that she had been recaptured on the 25th of the same month, and had arrived safe at Loch Swilly, in Ireland, where she lay in the possession of the recaptors. This information was immediately communicated to the underwriters; who had notice at the same time that the owners persevered in the abandonment. By a subsequent agreement between the

the parties, entered into without prejudice to their reſpective rights, the plaintiffs, after paying ſalvage to the recaptors, recovered poſſeſſion of the ſhip, and received the freight of the goods on board her. The ſhip was never brought into an enemy's port, nor did ſhe ſuſtain any damage whilſt in poſſeſſion of the enemy. The actual loſs on *ſhip* for ſalvage, &c. was 15*l.* 4*s.* 8*d.* per cent, and on *freight* 13*l.* 11*s.* 5*d.* on the ſums inſured: but if the plaintiffs were entitled to abandon, the loſs amounted to 52*l.* 9*s.* per cent. on *ſhip*, and 46*l.* 18*s.* on *freight*, after accounting for the proceeds.

The *Attorney General* contended, that the plaintiffs had a right to recover as for a total loſs. He allowed, that in *Hamilton* v. *Mendes* (*a*) Lord Mansfield had expreſsly excepted this caſe, and ſaid he gave no opinion how it would be, if the ſhip and goods were reſtored in ſafety between the offer to abandon and the action brought, or between the commencement of the action and the verdict. But though where there had been a capture and recapture, the aſſured have no right to abandon after the ſhip has arrived ſafe in port, they might clearly do ſo at a time when, as far as was known to them, the loſs was complete and irretrievable. Here there had been a complete loſs by capture, and the owner of the ſhip on being informed of it, had a right to come upon the underwriters for the ſum inſured, and to place them in his ſituation. The abandonment was good when made, and remained binding on both parties, notwithſtanding the re-

(*a*) 2 Burr 1198, 1 Bl. Rep. 276. S. C.

capture.

capture. Suppoſe a ſhip, after a capture and abandonment, ſhould be carried into a port which ſhe could not otherwiſe have entered, and that her cargo ſhould be ſold there at a profit of 100*l.* per cent. this would be for the benefit of the underwriters. Though nothing had happened here to heighten the value of the thing inſured, ſtill the underwriters muſt ſtand in the place of the owner, and grant him that full indemnity to which he had a right when the abandonment took place.

Park, on the other ſide, maintained, that though there was no expreſs deciſion upon this point, yet upon the general principle, of inſurance being a contract of indemnity, the plaintiffs could here go only for an average loſs. In fact the ſhip, during the four days ſhe was in the poſſeſſion of the enemy, had ſuſtained no damage, and if the expence of the ſalvage were paid by the underwriters, the owners would be placed in the ſame ſituation as if the ſhip had never been captured. Beſides, at the time of the abandonment the plaintiffs had only heard a report of the capture, which might have afterwards turned out to be falſe.—Lord Mansfield, by excepting this caſe in Hamilton *v.* Mendes, ſeemed to be rather againſt the validity of an abandonment, where the ſhip is reſtored without damage before action brought; and he there obſerved, "it was impoſſible that any man ſhould deſire to abandon in a caſe circumſtanced like the preſent, but for one of two reaſons, namely, either becauſe he has overvalued, or becauſe the market has fallen below the original price; and that the only reaſon that could make it the intereſt of the party to de-

ſire, were concluſive againſt allowing it (*a*)." Here the actual loſs on the ſhip was 15*l.* per cent. only, and the loſe claimed was 52*l.* per cent. but it was impoſſible that the difference between the two ſums ſhould be thrown upon the underwriters, and that the owners ſhould receive not merely an indemnity, but a benefit from the capture.

Lord ELLENBOROUGH.—The latter circumſtance cannot be looked to; but the queſtion muſt be decided upon broad and general principles. And I am clearly of opinion, that where there has been a capture and recapture, if the owner has notice of the ſhip being captured, and abandons before he hears of her being recaptured, the abandonment is valid, and he may proceed againſt the underwriters as for a total loſs. Here no certainty exiſted as to the capture at the time of the abandonment; but, in caſes like this, men muſt act upon probable information, and leave the effect of their acts to be determined by the eventual truth or falſehood of the intelligence they receive. If I hear of my ſhip being taken, in the Eaſt or Weſt Indies, I am not obliged to wait till I certainly know the event, by the teſtimony of thoſe who were preſent. Provided the thing has once exiſted, what I do, believing it to have taken place, muſt be valid and effectual. If an abandonment is made where there has been no capture, of courſe it goes for nothing, however ſtrongly the circumſtance may have been reported. Aſſuming the fact the

(*a*) 2 Burr. 1213.

the plaintiffs, on the 1ſt of October, had reaſon to ɛve that their ſhip was captured, and they were ıg *bonâ fide*, I think they were authoriſed to aban-, and that as the ſhip proves actually to have been :ured, the abandonment ſtands good, notwith-ding the recapture. In Hamilton *v.* Mendes, d Mansfield does not lay down the rule broader ı was neceſſary for the deciſion of that particular ; but the principle of that caſe applies ſtrongly to preſent.—However, as the point is new, I ſhall be l to ſee it put into ſome ſhape in which the opi-n of the court may be taken upon it.

A verdict was then entered for the plaintiffs, with ve to move for a new trial, or to ſtate a caſe for the nion of the court(*a*).

The *Attorney General* and *Scarlett* for the plaintiff.

Park and *Holroyd* for the defendant.

[Attornies, *Windle* and *Manley*.]

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a) A new trial was not moved for, and the caſe has not been lown for argument.

Same Day.

STAPP v. LILL.

An agreement in writing, by which the defendant undertook to guarantee the payment of any goods which the plaintiff should deliver to a third person, sufficiently expresses the consideration for the defendant's undertaking, to render the agreement binding, under the 4th Section of the statute of frauds; although it contains no promise on the part of the plaintiff to deliver goods, and no action would have lain upon it against him.

THIS was an action to recover the sum of 482*l.* being the value of certain goods furnished by the plaintiff to one Nichols, under a written agreement signed by the defendant in the following words:—"*I guarantee the payment of any goods which Mr. John Stapp shall deliver to Mr. Nichols of Brick-lane.*"

The *Attorney General* objected that this guarantee was void, under the 4th section of the statute of frauds; as it did not express any consideration for the defendant's promise to answer for the debt of another person. The whole *agreement* must be in writing, and the consideration for the promise was an essential part of it. Here there was an undertaking, on one side, to guarantee the payment of the goods: to see whether there was any consideration expressed for this promise, the proper way was, to consider whether any action could have been brought on the supposed agreement, by the defendant against the plaintiff. But there was no undertaking on the part of the latter to deliver goods to Nichols, and no action would have lain against him had he refused to deliver any. By the terms of this contract no benefit was conferred upon the defendant, and the plaintiff was not subjected to any inconvenience. The *agreement* therefore was not in writing. The case of *Wain* v. *Warlters* (*a*) was expressly in point;

(*a*) 5 East, 10.

and

and though it had ſince been held, in *Egerton* v. *Matthews*(*a*), that it was not neceſſary that a memorandum on the ſale of goods ſhould expreſs any conſideration for the purchaſer's promiſe, that was a deciſion on the 17th Section of the ſtatute, whereas this caſe, like *Wain* v. *Warlters*, turned upon the 4th, in which alone the word *agreement* is uſed.

Garrow, on the other ſide, maintained, that the guarantee was good; as the conſideration for the defendant's undertaking was apparent on the face of it. He allowed that this was neceſſary; but though it was not permitted to look out of the guarantee for the conſideration, there was no technicality neceſſary in the ſtructure of this or any other mercantile inſtrument, and it was enough if it ſhewed that the plaintiff was to do ſomething which he would not otherwiſe have done, and which would put him to inconvenience before the defendant's reſponſibility attached. He denied the criterion of conſideration, that a croſs action ſhould lie againſt the perſon to whom the promiſe is made. It frequently happened that no action would lie to compel a performance of that which, when performed, became a valid conſideration to ſuſtain a promiſe. In this caſe the plaintiff would not have delivered any goods to Nichols but for the defendant's undertaking to be anſwerable for him, and it was quite impoſſible, therefore, that this guarrantee ſhould be conſidered a *nudum pactum*.

(*a*) 6 Eaſt, 307.

Lord

Lord ELLENBOROUGH ſaid, that though by the agreement the plaintiff was not obliged to deliver goods, there appeared a ſufficient conſideration for the defendant's promiſe to be anſwerable if any ſhould be delivered. He ſhould therefore admit evidence of the delivery of the goods.—And the plaintiff had a verdict.

In the enſuing term the *Attorney General* moved for a rule to ſhew cauſe why this verdict ſhould not be ſet aſide and a nonſuit entered.—But

THE COURT ſaid, that this caſe differed from *Wair* v. *Warlters*, as the agreement here contained th- thing to be done by the plaintiff, which was the foun- dation of the defendant's promiſe; and that the d- livery of the goods was a ſufficient conſideratio-, although no croſs action upon the agreement cou- d have been brought againſt the plaintiff, either at t- e ſuit of the defendant or of Nichols.—*Rule niſi refuſe- d.*

Garrow and *Eſpinaſſe* for the plaintiff.

The *Attorney General* and *Walker* for the defendant.

[Attornies, *Bugg* and *Rhodes*.]

Vide Hodgſon v. Le Bret, *ante* 233.

ROBINSON

ROBINSON *v.* NAHON.

Tuesday, March. 1.

If a man marries a woman, and holds her out to the world as his wife, he does not discharge himself from his liability for necessaries supplied to her, by proving a previous marriage between himself and another woman still alive; unless he brings home a clear knowledge of the celebration of the first marriage to the person who supplied the necessaries to the second wife.

ASSUMPSIT for the use and occupation of certain furnished apartments of the plaintiff by the defendant's wife.

It appeared that the apartments in question had been occupied by a lady, who went by the defendant's name, from February to November, 1807; that that interval the defendant frequently visited her and called her his wife; and that they had actually been married, according to the rites and ceremonies the church of England, on the 26th day of October, 1805.

The defence was, that the defendant had a former wife then and still living.—It was in fact proved, that Nahon being a Jew was married according the rites and ceremonies of the Jewish religion, above 18 years ago, to his wife Leah, who has resided in the same house with him ever since; and that on one occasion the plaintiff came to his house with the woman he had married last, insisting that she should be received by him as his wife, and that the other should be turned away.

Lord ELLENBOROUGH said, there was no evidence to fix the plaintiff with a knowledge of the celebration of the first marriage, and that the defendant was

eſtopped to ſet up bigamy as a bar to the action. He had given the woman who lodged with the plaintiff every appearance of being his wife. By his miſ-conduct, in marrying a ſecond wife, while his firſt was ſtill alive, he had done what he could to confer the right of marriage upon both, and had incurred a civil as well as a criminal reſponſibility.

Verdict for the plaintiff.

Garrow and *Hullock* for the plaintiff.

Park for the defendant.

[Attornies, *Alderſon* and *Harris*.]

Vide Watſon *v.* Threlkeld, 2 Eſp. N. P. Caſ. 637.

Same Day.

SCOTT AND OTHERS *v.* LIFFORD.

Although no conſideration paſſes between the payee and drawer of a bill of exchange, it is not to be conſidered an accommodation bill as to the latter, if there was a valuable conſideration as between the payee and the acceptor.—If policies of inſurance are lodged with the payee of a bill of exchange as a collateral ſecurity, they do not operate as ſatisfaction till money is actually received upon them, although upon a ſubmiſſion to arbitration a certain ſum may have been awarded to be due upon them.—A bill of exchange, all the parties to which reſided in the ſame town, became due on the 4th of the month, when it was preſented for payment by the payee's bankers, who returned it to him diſhonored on the 5th. Held that a letter ſent by him to the drawer on the 6th was reaſonable notice of the diſhonor of the bill.—Where the parties to a bill of exchange reſide in London or the vicinity, notice of the diſhonor of the bill may be ſent by the *two-penny* poſt.

ASSUMPSIT by the payees againſt the drawer of a bill of exchange for 1500*l.* dated 1ſt March 1806, at 3 months after date.

The

The action was defended on three grounds; 1. That the bill was drawn without conſideration. 2. That the plaintiffs had received ſatisfaction. 3. That the defendant had not notice of its diſhonor.

1. One Moſes Agar having an acceptance due to the plaintiffs for 1500*l.* begged to have it renewed. They agreed to this, if the defendant, his uncle, would draw a bill upon him for the amount, which he ſhould accept. The bill in queſtion was accordingly drawn and accepted. 2. Agar at the ſame time lodged with the plaintiffs, by way of collateral ſecurity, policies of inſurance to the amount of 11,000*l.* on which arbitrators, to whom it was referred to ſee what was due upon them, had, ſince then, awarded 11 per cent.—3. The bill was paſſed by the plaintiffs to their bankers, Meſſrs. Down and Co., and preſented for payment on the 4th of June, firſt by their clerk, and then by a notary public, who returned it to them diſhonored on the morning of the 5th. They returned it that day to the plaintiffs, who reſide in London; and ſome time in the courſe of the following day, (at what hour did not appear,) the plaintiffs put a letter, giving notice of the diſhonor of the bill, into the two-penny poſt-office, addreſſed to the defendant, who reſides at Shadwell.

Lord ELLENBOROUGH held, 1. That the bill was not to be conſidered as an accommodation bill, there having been a conſideration as between the payees and the acceptor. The plaintiffs had never ſaid they

would not look to the defendant, and therefore had not renounced their ſecurity againſt him as drawer of the bill. 2. If it had been proved that the plaintiffs had received any thing upon the policies, this *pro tanto* would be ſatisfaction; but all that appeared was, that the arbitrators had awarded a certain ſum to be due. The plaintiffs were, therefore, entitled to recover from the defendant the whole ſum ſpecified in the bill, and muſt afterwards deliver up the policies, or refund the money received under them. 3. The third point his lordſhip left to the jury, with this direction, that if notice of the diſhonor of the bill had been ſent to the defendant with all convenient and practicable diſpatch, they ſhould find for the plaintiffs; but that otherwiſe, they ſhould find for the defendant, whether the delay had been occaſioned by the default of the notary, of Down and Co., or of the plaintiffs themſelves.

The Jury found a verdict for the plaintiffs.

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9. East. 347. In the following term *Wigley* moved for a rule to ſhew cauſe why this verdict ſhould not be ſet aſide on the ground of the inſufficiency of the notice ſent to the defendant of the diſhonor of the bill. He contended that as the bill was payable on the 4th, it was the duty of the plaintiffs to have ſent notice earlier than the 6th; and that at any rate the two-penny poſt was an improper vehicle; for although where the parties lived at a great diſtance, a letter ſent by the general poſt was ſufficient, yet it had never

ever been decided, that where the parties reſide in ıe ſame town, merely putting a letter into a receiv-ıg-houſe of the penny or two-penny poſt was a roper mode of tranſmitting notice of the diſhonor f a bill.—But

THE COURT ſaid, that as the bankers only re-ıived the bill back on the 5th, notice by the plain-ffs on the 6th was reaſonable within every rule f law; and that they did not ſee why, when the arties reſide in London or the near neighbourhood, ıe party ſending the notice ſhould not be allowed to ail himſelf of the convenience of the two-penny oſt, but ſhould be obliged to diſpatch a ſpecial meſ-nger (*a*).—They therefore refuſed a rule to ſhew auſe.

To prove the facts of this caſe at Niſi Prius, Agar ıe acceptor of the bill was offered as a witneſs on ıe part of the defendant. Being examined on the *oire dire*, it appeared that after the bill was due he ad become bankrupt, and had ſince obtained his ertificate. The *Attorney General* therefore objected o his competency; as he was no longer liable to the ayees of the bill, but would ſtill be ſo to the drawer

A general releaſe in the common form diſcharges the releaſee of all actions in reſpect of any thing that has happened before the date of the releaſe, although the cauſe of action was not then complete. Therefore in an action by the payee againſt the drawer of a bill of exchange,

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(*a*) Sanderſon *v.* Judge, 2 H. Bl. 509. Kuſh *v.* Weſton, Eſp. N. P. Caſ. 54. Shaw *v.* Markham, Peak. N. P. Caſ. 165. Hawkins *v.* Rutt, Ib. 186.

such a release to the acceptor, who had become bankrupt and obtained his certificate, renders him a competent witness for the defendant.

after the latter was compelled to pay by the present action (*a*); which it was thus his interest to defeat.

The objection being allowed, a general release was executed to him; whereby the defendant released unto the said M. Agar, his heirs, executors, &c. all actions and causes of action, &c. which he the said defendant then had, or which he, his heirs, executors, or administrators should or might at any time thereafter have, against the said M. Agar, for or by reason of any matter or thing whatsoever, from the beginning of the world unto the day of the date of the said writing of release.

The *Attorney General* contended, that this did not discharge *Agar* from the consequences of the present action, and therefore did not restore his competency. The release could only extend to causes of action which had already accrued; but the defendant had as yet no cause of action against the witness, and would have none until there should be a verdict and judgment against him as drawer of the bill.

Lord ELLENBOROUGH however held, that this release of all causes of action, for or by reason of any matter or thing which had happened down to the present moment, would discharge the acceptor of the bill from all liability to the drawer, whatever might be the event of this suit. The transaction was already past, which was to lay the foundation of future liability, and if the drawer of the bill should have a cause of action

(*a*) *Vide* Ex parte Brymer. Co. B. L. 165.

against

againſt the acceptor, it would have reference back to the acceptance, and would be diſcharged by the releaſe.—The witneſs was therefore admitted (*a*).

The *Attorney General* and *Marryat* for the plaintiff.

Garrow and *Wigley* for the defendant.

[Attornies, *Crowden & Co.* and *Nind.*]

(*a*) *Vide* Co. Lit. 285. a, Com. Dig. tit. Releaſe (E).

MILLER *v.* FALCONER. Same Day.

In an action for running againſt plaintiff's cart with a dray, the ſervant who was driving the cart when the accident happened is not a competent witneſs for the plaintiff, without a releaſe.

CASE for negligence in running againſt plaintiff's cart with a dray.

The firſt witneſs called was the ſervant who drove the cart when the accident happened.

The *Attorney General* for the defendant objected to his competency, without a releaſe; as *primâ facie* he was himſelf in fault, and anſwerable for what had happened.

Lord ELLENBOROUGH.—The witneſs certainly comes to diſcharge himſelf, and therefore ought to be releaſed.

A releaſe was executed to him accordingly, and the plaintiff had a verdict.

Garrow and *Marryat* for the plaintiff.

The *Attorney General* for the defendant.

[Attornies, *Gale* and *Druce*.]

Same Day.

LAING *v.* CHATHAM.

Where the defendant has a ſet off againſt the plaintiff, of which he gives notice under the ſtatute, but does not appear at the trial to offer evidence of it, the plaintiff may either take a verdict for the whole ſum he proves to be due to him, ſubject to be reduced to the ſum really due on a balance of accounts, if the defendant will afterwards enter into a rule not to ſue for the ſet off; or he may take a verdict for the ſmaller ſum, with a ſpecial indorſement on the poſtea, as a foundation for the court to order a ſtay of proceedings, if another action ſhould be brought for the amount of the ſet off.

ASSUMPSIT for goods ſold and delivered.—The defendant had pleaded the general iſſue and given a notice of ſet off; but did not now appear.

Garrow, for the plaintiff, having proved his caſe, obſerved he was at a loſs for what ſum to take the verdict. He allowed the defendant had a croſs demand to a certain amount againſt the plaintiff; but he was afraid that if a deduction for this ſhould be made from the damages he was ſtrictly entitled to, the defendant would notwithſtanding bring another action for the ſame cauſe. He therefore prayed that there might be a ſpecial indorſement on the poſtea, to ſhew afterwards on what principle the verdict had proceeded.

Lord ELLENBOROUGH ſaid, ſuch an indorſement ſhould be made, and the plaintiff might either take the larger ſum, ſubject to be reduced, on the defendant's entering into a rule to bring no action for the ſet off; or for the ſmaller ſum, deducting the ſet off now; after which if the defendant ſhould bring

bring another action, the ſpecial indorſement on the poſtea would be a ground for the court to ſtay proceedings in it.

A conditional verdict was taken for the whole debt proved to be due to the plaintiff, and an indorſement made on the poſtea, to let in the defendant upon the above terms to reduce it to the ſum actually due on a balance of accounts between them.

Garrow and *Marryatt* for the plaintiff.

[Attornies, *Wright* and *Cuſtody*.]

Vide Seddon *v.* Tutop, 6 T. R. 607. Lechmere *v.* Toplady, 2 Vent. 169.

JAMES SADLER *v.* JAMES ROBINS. Same Day.

ASSUMPSIT on a decree of the high Court of Chancery in the iſland of Jamaica.—The declaration ſtated, that on the 16th day of July, 1805, in a certain cauſe, wherein James Sadler and others were complainants, and James Robins and others, executors of John Sadler deceaſed, were defendants, it was by the ſaid high Court of Chancery ordered, adjudged and decreed, that the ſaid James Robins and one R. Haywood, ſince deceaſed, ſhould on or before the firſt day of January then next enſuing pay unto the ſaid James Sadler, or his lawful attorney or attornies in the ſaid iſland, the ſum of 3670*l.* 1*s.* 9¼*d.* current money of the ſaid iſland, with intereſt thereon from the 31ſt day of December then laſt paſt, *firſt deducting*

Aſſumpſit will not lie on a decree of a foreign court, whereby the defendant is ordered to pay a certain ſum of money to the plaintiff on a certain day, *firſt deducting thereout the defendant's coſts to be taxed by the proper officer*; where the defendant's coſts have not been taxed, either at his own requeſt, or upon an *ex parte* proceeding at the inſtance of the plaintiff.

ing thereout the full coſts of the ſaid defendants expended in the ſaid ſuit, the ſame to be taxed by George Howell, Eſq. one of the maſters of the ſaid court; and alſo deducting thereout all and every further payment or payments which the ſaid James Sadler and R. Haywood or either of them might, on or before the ſaid 1ſt day of January, 1806, ſhew to the ſatisfaction of the ſaid George Howell that they or either of them had paid on account of their ſaid teſtator's eſtate. The declaration having then ſtated a liability and promiſe in the words of the decree, and the amount of the ſum to be paid in ſterling money with intereſt, went on to aver that the ſaid James Robins and R. Haywood did not nor did either of them on or before the 1ſt day of January, 1806, or at any ſubſequent time, cauſe the coſts by the ſaid defendants in the ſaid cauſe in the ſaid court of Chancery expended in that ſuit to be taxed by the ſaid George Howell, Eſq., or by any other of the maſters of the ſaid court of Chancery, but as well the ſaid James Robins, and R. Haywood, in the life-time of the ſaid R. Haywood, as the ſaid James Robins ſince the death of the ſaid R. Haywood, have altogether neglected and refuſed ſo to do, nor did the ſaid James Robins, and R. Haywood, in the life-time of the ſaid R. Haywood, on or before the ſaid firſt day of January, 1806, ſhew to the ſatisfaction of the ſaid George Howell, or any other maſter of the ſaid court, that they or either of them had paid on account of the ſaid teſtator's eſtate any ſum or ſums of money whatſoever: Breach, for non-payment of the ſaid ſum of 3670l. 1s. 9¼d. current money, with intereſt due thereon, as mentioned in the decree.—Plea, *the general iſſue.*

The

The *Attorney General* having opened the plaintiff's caſe,

Lord ELLENBOROUGH expreſſed himſelf of opinion hat the action was not maintainable; as it did not ap-ear what ſum was actually due to the plaintiff ac-ording to the terms of the decree.

The *Attorney General* contended that it lay upon the efendant to reduce the ſum below that awarded to be aid on the firſt of January 1806, and that if he ook no ſteps for this purpoſe, the whole ſum of 670*l.* 1*s.* 9¼*d.* currency, became abſolutely due on hat day. It was impoſſible for the plaintiff either to ix the coſts of the defendants in the ſuit, or to ſhew what ums of money any of them had paid for their teſtator; nd it was plain, from the words of the decree, that efore any deduction was to be made by the plaintiff, he acts of taxing coſts and proving payments were to e done by the oppoſite party.

Lord ELLENBOROUGH. "*Deducting* thereout the ll coſts of the ſaid defendants" is the ſame as "the ll coſts of the ſaid defendants firſt being *deducted* hereout;" and if the defendants did not appear to tax eir coſts, the plaintiff might have proceeded *ex parte*. t preſent, the ſum due on the decree is quite indefi-te. The operations to aſcertain it ſhould have taken lace in the court of Chancery in Jamaica, and cannot e gone through here, at *niſi prius*. Had the decree een perfected, I would have given effect to it, as well as to a judgment at common law. The one may be the conſideration for an aſſumpſit equally with the other

other. But the law implies a promiſe to pay a definite, not an indefinite ſum.

Although an objection appear upon the record, and might be taken advantage of by motion in arreſt of judgment or writ of error, yet if it be of ſuch a nature, that the action clearly cannot be maintained, the judge at *niſi prius* will nonſuit the plaintiff.

The *Attorney General* then urged ſtrenuouſly, that the objection was upon the record, and that if it was well founded, judgment might be arreſted.

Lord ELLENBOROUGH.—If there is evidently no conſideration to raiſe a promiſe, ſo that the action cannot be ſupported, why ſhould the defendant be put to move in arreſt of judgment? The plaintiff ought not to have brought his action here, while the decree was in an incomplete ſtate. The caſe we had at the ſittings after laſt term (*a*) ſhews with what facility theſe decrees and judgments in the Weſt India iſlands are obtained; and they ought to be examined with ſome ſtrictneſs before they are put in force in this country. In many other caſes, when it is clear the action will not lie; although the objection appears on the record, and might be taken advantage of by motion in arreſt of judgment, or by writ of error, judges are in the habit of directing a nonſuit.

The plaintiff was then called.

The *Attorney General* in the following term obtained a rule to ſhew cauſe why this nonſuit ſhould not be ſet aſide; but cauſe being ſhewn, the

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(*a*) Buchanan *v.* Rucker, *ante* 63.

judges were unanimouſly of opinion that it ought to ſtand.

Lord ELLENBOROUGH.—There appears to be due to the plaintiff upon the decree a ſum of money—*x*. Till the ſum to be deducted is aſcertained, it is impoſſible to ſay how much is really due. The plaintiff ought to have taxed the coſts *ex parte*. There is no court where this proceeding is not allowed. At preſent no one can predicate how much the defendant is decreed to pay. The decree is therefore imperfect and cannot be the foundation of an aſſumpſit. As to the payments on account of the teſtator's eſtate, none being proved, it might be preſumed that there were none; but there had certainly been coſts expended in the ſuit, and until they are deducted according to the terms of the decree, an action cannot be maintained upon it.

GROSE, *J.*—The plaintiff ſhews what ſum is not due to him, not what ſum is due.

LE BLANC, *J.*—It is clear that the plaintiff is not entitled to the whole ſum mentioned in the decree; and it was competent to him to have had the coſts taxed at ſomething however ſmall.

BAYLEY, *J.*—Of the ſame opinion.

Rule diſcharged.

The

The *Attorney General* and *Le Blanc* for the plaintiff.

Garrow and *Comyn* for the defendant.

[Attornies, *Shawe* and *Richardson*.]

Vide Buchanan *v.* Rucker, Ante 63, and the cases there referred to.

Same Day.

WILTSHIRE v. SIMS.

An agent employed generally to do any act, is authorised to do it only *in the usual way of business*. Therefore as stock is sold usually for ready money only, a broker employed to sell stock cannot sell it upon credit, without a special authority, although acting *bonâ fide*, and with a view to the benefit of his principal.

ACTION for not transferring stock.

The only witness was *Watkins*, the broker in this transaction, who stated that the defendant gave him orders to sell out 500*l.* of the stock of the trustees of the Commercial Road; that on the 27th of August he agreed to sell it to the plaintiff; that as the transfer could not be made till the expiration of a fortnight, when there was to be a meeting of the trustees, the plaintiff paid him for the stock by a promissory note at 14 days; that in taking the note he acted with a view to his employer's advantage, thinking the stock might fall before the transfer could be made; that he paid in the note to his bankers, where it was attached for a debt of his own; and that at the end of the fortnight the defendant refused to make the transfer, as he had received no part of the purchase money.

It was contended for the plaintiff, that the sale of the stock on the 27th of August was binding on the

defendant. Watkins was his authoriſed agent, and had acted *bonâ fide* for his benefit. He muſt be ſuppoſed to have empowered his agent to ſell the ſtock in the manner moſt for his intereſt, and the loſs ought to fall upon him, not upon the plaintiff, who had paid for the ſtock, under the natural impreſſion that Watkins had authority to ſell it immediately, though a ſhort time was to intervene before the ſtock could be transferred in the books of the truſtees.

Lord ELLENBOROUGH. When the defendant employed the broker to ſell the ſtock, he employed him to ſell it in the uſual manner. He made him his agent for common purpoſes in a tranſaction of this ſort. But did any one ever hear of ſtock being abſolutely exchanged for a bill at 14 days? Has a broker in common caſes power to give credit for the price of the ſtock which he agrees to ſell? The broker here ſold the ſtock in an *unuſual* manner; and unleſs he was expreſsly authoriſed to do ſo, his principal is not bound by his acts.

Plaintiff nonſuited.

Garrow, *Park*, and *Lawes*, for the plaintiff.

The *Attorney General* and *Reader*, for the defendant.

[Attornies, *Wiltſhire* and *Unwin*.]

Per Chambre, J. "There is no doubt of the authority of a factor to ſell upon credit, though not particularly authoriſed by the

the terms of his commiſſion ſo to do." Houghton *v.* Matthews, 3 Boſ. and Pul. 489. Scott *v.* Surman, Willes 407. S. P. But this doctrine is founded on "the conſtant and daily experience, that factors do ſell upon credit without any ſpecial authority," and therefore confirms the general maxim, that when an agent is employed to do any act, he ſhall be ſuppoſed to have an authority to do it in the manner in which it is uſually done. Goods are almoſt always, ſtock is ſcarcely ever, ſold upon credit, and hence the diſtinction between the powers of the factor and the ſtock broker. An agent can in no caſe bind his principal by any act beyond the ſcope of his authority. Fenn *v.* Harriſon, 3 T. R. 757.

Wedneſday, March 2.

REX v. LLOYD.

If a paſſage leading from one part to another of a public ſtreet (though by a very circuitous route), made originally for private convenience, has been open to all the world for a great number of years, without any bar or chain acroſs it, and without any perſon paſſing through it meeting with interruption, it is to be conſidered as *dedicated to the public*, and it becomes a highway, to obſtruct which is an indictable offence.

THIS was an indictment for obſtructing a highway.

It appeared that the place in queſtion is a narrow paſſage lying on the north ſide of Snow-Hill, called Cock-court; and being of an oblong ſhape, leads from one part of this ſtreet to another, without having any outlet elſewhere. The houſes all the way round had once belonged to the ſame individual; and the defendant, having purchaſed thoſe at the top of the court, built a wall acroſs there, intercepting all communication between the two ſides, unleſs by way of Snow-Hill. Till then, the paſſage had been open, as far back as could be remembered; and though it could in general be of no uſe to thoſe walking up or down Snow-Hill, being a moſt circuitous route which no one would willingly take, yet it was convenient for the public, when the ſtreet was blocked up by a crowd. The

paſſage

paſſage had been long lighted by the city of London, and there had never been any chain acroſs it, or any mark to denote its being private property.

Lord ELLENBOROUGH. I take it for granted the defendant means to ſhew habitual interruptions offered to perſons attempting to paſs through.

Marryat, for the defendant, contended that evidence of this kind was not neceſſary, and that this court could not be conſidered a highway, to obſtruct which was a public crime. It had been made originally for the convenience of thoſe occupying the houſes on both ſides, and whether or not individuals might bring an action for the obſtruction, the public had no right to complain. It was of no uſe whatever to perſons paſſing and repaſſing through Snow-Hill; and if it was to be conſidered a public highway, becauſe people took refuge in it from a crowd, the ſame law might be extended to ſhops and private houſes. The circumſtance of its being lighted by the city was of no conſequence; as the city, to prevent indecorums, lighted many private courts, through which there was no thoroughfare, and in which the public could have no intereſt.

Lord ELLENBOROUGH.—I think that, if places are lighted by public bodies, this is ſtrong evidence of the public having a right of way over them; and to ſay that this right cannot exiſt becauſe a particular place does not lead conveniently from one ſtreet to another, would go to extinguiſh all highways where (as in Queen-

ſquare) there is no thoroughfare (*a*). If the of the ſoil throws open a paſſage, and neither by any viſible diſtinction, that he means to preſe his rights over it, nor excludes perſons from through it by poſitive prohibition, he ſhall be pi ed to have dedicated it to the public. Although tl ſage in queſtion was originally intended only f vate convenience, the public are not now to l cluded from it, after being allowed to uſe it f without any interruption.

The defendant was found *guilty* (*b*).

Garrow and *Arabin* for the proſecution.

Maryatt and *Pooley* for the defendant.

(*a*) In pleading a public highway, it is not neceſſary to ſtate any *termini*. 1 H. Bl. 351.

(*b*) But the erection of a bar, although it may have been knocked down, rebuts the preſcription of a dedication to the public.

Roberts v. Karr. Kingſton Lent Aſſizes, 1808. Cor. HEATH, *J.* To treſpaſs *quare clauſum fregit*, the defendant juſtified under a public right of way. —It appeared in evidence, that ſome years ago a ſtreet was made over the *locus in quo*, which had been before an incloſed field; that ſoon after the houſes were a bar was placed acroſs th to prevent carriages from through it; but that the ſoon knocked down; ſinc time it had been uſe thoroughfare. On the the defendant, it was co that this amounted to a d on to the public, at leaſt a path. But HEATH, *J.* ol that the putting up of rebutted the preſumpti dedication to the public. a dedication muſt be mac ly and with a deliberate

Nor could there be a partial dedication to the public, although there might be *a grant* of a footway only. This ſtreet, he thought was to be conſidered merely as a way for the uſe of the tenants inhabiting the houſes on each ſide of it.—There was a verdict for the plaintiff on this iſſue.

Lethbridge v. Winter. — Somerſet Spring Aſſizes, 1808. —Treſpaſs for entering plaintiff's cloſe, and pulling down a gate. Plea, that there was a public footway over the *locus in quo*, and becauſe the gate was wrongfully erected acroſs the ſame, the defendant pulled it down.—It appeared in evidence that the gate in queſtion had been recently put up in a place where a ſimilar gate had formerly ſtood, but where for the laſt twelve years there had been none. It was thereupon contended for the defendant, that from ſuffering the gate to be down ſo long and permitting the public to uſe the way without obſtruction for ſo many years, the plaintiff and thoſe under whom he claimed muſt be conſidered as having completely dedicated the way to to the public, and that the gate could not be replaced. The plaintiff however, under the direction of MARSHAL, Serjeant, had a verdict; which the court of K. B. the following term refuſed a rule niſi to ſet aſide.

Vide etiam Lade *v.* Shepherd, Stra. 1004. Goodtitle *ex. d.* Cheſter *v.* Alker, 1 Burr. 133.

JARRATT v. WARD.

Friday, March 4.

ASSUMPSIT on a policy of inſurance on the ſhip Lucia, from London to the ſouthern whale fiſhery and back again, with leave to carry letters of marque, and to cruiſe for, chaſe, capture, man, *and*

Leave granted in a policy of inſurance on a fiſhing voyage *to ſee prizes into port*, does not authorize the ſhip to remain in port till a prize receives neceſſary repairs, which ſhe could not otherwiſe have had; and at moſt extends to ſeeing the prize moored ſafely, and giving the neceſſary orders for her final deſtination.

ſee into port, any ſhip or ſhips of the enemies of our lord the king.

The chief queſtion was, whether the policy had been vacated by a deviation. The Lucia ſailed in March 1805, and in July arrived at Reio de Janeiro. There the maſter entered into an agreement with another whaler, to keep together for the reſt of the voyage, and to ſhare between them what prizes they ſhould make. They accordingly left Reio de Janeiro in the beginning of Auguſt, and immediately after captured a merchant veſſel. The prize was very leaky, and for the purpoſe of repairing her they went to St. Sebaſtian's. Finding however that the neceſſary repairs could not be done to her there, they bore away for St. Catharine's. At this place they remained a month, during which time they took out the cargo from the prize, and afterwards reloaded it when ſhe was repaired. They then diſpatched her for Europe, and proceeded on their voyage. Without their ſtaying at St. Catharine's and aſſiſting her, ſhe could not have been repaired or rendered fit to carry home her cargo. The Lucia was afterwards loſt by running aſhore on the coaſt of Peru.

Park, for the plaintiff, contended that the ſhip inſured in accompanying and ſtaying with the prize had not exceeded the liberty granted by the policy. To ſee prizes into port muſt mean, to take care of them until they were once in a ſtate of ſafety; and if the permiſſion authoriſed the yielding of neceſſary aſſiſtance to prizes at ſea, it muſt extend to granting the ſame aſſiſtance in port, or the other would be nugatory.

tory. Here but for the ſtay of the Lucia at St. Catharine's, the prize never could have been refitted, and might as well have been ſunk the day ſhe was captured. The intention of the policy clearly was to cover whatever was neceſſary for rendering any prizes taken in the courſe of the voyage available and beneficial to the captors, and it appeared that nothing had been done in the preſent inſtance beyond what was requiſite for that purpoſe.

The *Attorney General* on the other ſide obſerved, that the ſubſtance of this contract was a fiſhing voyage, and beyond that nothing could be done without ſpecial leave. The utmoſt extent of the privilege to ſee prizes into port was, to ſee them ſafely moored. But the ſhip was not to lie by and wait till they were repaired, thus lengthening the voyage and encreaſing the riſk. Although it might be neceſſary to ſtay by the prize ſo long at St. Catharine's, there was no liberty in the policy for this purpoſe, and therefore there had been a deviation, by which the underwriters were diſcharged.

Lord ELLENBOROUGH.—The ſcope of the voyage inſured was certainly only a commercial adventure. It was formerly conſidered that in ſuch a caſe the mere taking of a letter of marque on board, without the conſent of the uderwriters, vitiated the policy, from the temptation it held out to privateering (*a*) : but I believe the general

(*a*) So held in Denniſon *v.* Modigliani, 5 T. R. 580. But in Moſs *v.* Byron, 6 T. R. 379. The court of K. B. decided that letters of marque taken out, without the proper certificate and

general opinion now is, that a mere irritation of this ſort ſhall not operate as a deviation. Here leave is given to ſee prizes into port, which would have authoriſed the ſhip to accompany prizes to any convenient port, conſiſtent with the main adventure. She might have entered the port with them, and ſeen them ſafely moored, and perhaps ſtopped a reaſonable time to give directions for their proceeding on their final deſtination. All this might have ranged under the words of the policy; but in their largeſt ſenſe they could not juſtify the ſhip in waiting till the prize was repaired. If this were allowed, when was the voyage to terminate? On leaving St. Catharine's another prize might have been taken, ſtanding equally in want of repairs; afterwards a third, and ſo on in an infinite ſeries. This therefore turns out to be a riſk, which the defendant did not underwrite.

The defendant had a verdict.

Park and *Taddy* for the plaintiff.

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and without any intention of cruiſing, merely for the purpoſe of enticing ſeamen to enter, did not avoid the policy, even though the captain, againſt his inſtructions, cruiſed and took prizes. And, *per* LAWRENCE, *J.* in Raine v. Bell, 9 Eaſt, 201. "If an *intention* to deviate, not carried into effect, will not avoid a policy, ſtill leſs can a *temptation* to deviate. If the doing of a thing do not alter the riſk of the underwriter, and be not expreſsly prohibited to be done, I cannot ſay that it vitiates the policy, as upon the breach of an implied condition."

The

The *Attorney General*, *Garrow*, and *Scarlett* for the defendant.

[Attornies, *Palmer and Co.* and *Smith.*]

M'Dougall, Gent. one, &c. *v.* Claridge, Gent. one, &c.

Same day.

THIS was an action for a libel on the plaintiff in his profeſſion as a ſolicitor.—Plea, *the general iſſue.*

A letter written confidentially to perſons who employed A. as their ſolicitor, conveying charges injurious to his profeſſional character in the management of certain concerns which they had intruſted to him, and in which B. the writer of the letter was likewiſe intereſted, cannot be conſidered a libel, and made the ſubject of an action for damages.

The libel ſet out in the declaration was contained in a letter written by the defendant to Meſſrs. Wright and Co. bankers at Nottingham, and charged the plaintiff with improper conduct in the management of their concerns. It appeared, however, that the letter was intended as a confidential communication to theſe gentlemen, and that the defendant was himſelf intereſted in the affairs which he ſuppoſed to be miſmanaged by the plaintiff.—After the caſe had been opened by the plaintiff's counſel——

Lord Ellenborough ſaid, if the letter had been written by the defendant confidentially, and under an impreſſion that it's ſtatements were well founded, he was clearly of opinion that the action could not be maintained. It was impoſſible to ſay that the defendant had maliciouſly publiſhed a libel to aggrieve the plaintiff, if he was acting *bonâ fide*, with a view to the

intereſts of himſelf and the perſons whom he addreſſed; and if a communication of this ſort, which was not meant to go beyond thoſe immediately intereſted in it, were the ſubject of an action for damages, it would be impoſſible for the affairs of mankind to be conducted. His Lordſhip referred to a caſe of *Cleaver v. Sarraude*, tried on the northern circuit while he was at the bar; where, in an action like the preſent, it appeared that the letter had been written confidentially to the Biſhop of Durham, who employed the plaintiff as ſteward to his eſtates, to inform him of certain ſuppoſed mal-practices on the part of the plaintiff; upon which the judge who preſided declared himſelf of opinion, that the action was not maintainable, as the defendant had been acting *bonâ fide*; and the nonſuit which he directed had been acquieſced in, from a conviction entertained by the plaintiff's counſel of its being founded in law.

The *Attorney General*, for the defendant, ſaid, that his client at the time of writing the letter was certainly impreſſed with a belief of the truth of the charges it contained, but had ſince ſeen reaſon to believe they were groundleſs.—He therefore conſented to *withdraw a juror*.

Park and *Reader* for the plaintiff.

The *Attorney General*, *Garrow*, and *Runnington* for the defendant.

[Attornies, *M'Dougall* and *Clarkſon*.]

ike manner verbal com-
tions, when confidential,
: actionable; and if A. is
for B. to C., A. if acting
de, may lawfully ſtate to
n unreſerved manner, his
of B's conduct and
er, whatever the charges
which he thus imputes

n v. Bigg. London Sit-
after T. T. 48 G. 3.
on for words. Plea *not*
—The plaintiff was a deal-
ıeer, buying it of brew-
l ſelling it to publicans.
g to open an account
he defendant, a brewer,
igh became his ſurety for
ce of ſuch quantities of
ſhould from time to time
plied to him, the defen-
romiſing to inform Leigh
default in his payments
›y the plaintiff. After
rties had dealt together
ne time, the defendant
o Leigh, and ſpoke to
very opprobrious terms
plaintiff; ſaying that he
to cheat him; that he
ıt back, as unmerchan-
ıeer which he himſelf had
ated; that he was a
and a raſcal, &c. At
riod there was a ſum of
due from the plaintiff to
endant, in reſpect of the
which Leigh had given
ntee.

Lord ELLENBOROUGH.—I am inclined to think that this was a privileged communication. Had the defendant gone to any other man and uttered theſe words of the plaintiff, they certainly would have been actionable. But Leigh, to whom they were addreſſed, was guarantee for the plaintiff; and the defendant had promiſed to acquaint him when any arrears were due. He therefore had a right to ſtate to Leigh what he really thought of the plaintiff's conduct in their mutual dealings; and even if the repreſentations which he made were intemperate and unfounded, ſtill if he really believed them at the time to be true, he cannot be ſaid to have acted maliciouſly, and with an intent to defame the plaintiff. To be ſure, he could not lawfully, under colour and pretence of a confidential communication, deſtroy the plaintiff's character and injure his credit: but it muſt have the moſt dangerous effects, if the communications of buſineſs are to be beſet with actions of ſlander. In this caſe the defendant ſeems to have been betrayed by paſſion into ſome unwarrantable expreſſions. I will therefore not nonſuit the plaintiff; and it will be for the jury to ſay, whether theſe expreſſions were uſed with a malicious intention of degrading the

the plaintiff, or, with good faith, to communicate facts to the ſurety which he was intereſted to know.

The parties agreed to withdraw a juror.

Garrow and *Storks* for the plaintiff.

The *Attorney General* and *Wigley* for the defendant.

So an action will not lie at the ſuit of a ſervant againſt his late maſter, for words ſpoken, or a letter written by him, in giving a character of the ſervant, unleſs the imputation complained of was not only falſe, but *malicious*. Weatherſtone *v.* Hawkins, 1 T. R. 110.—Edmonſon *v.* Stephenſon, Bull. N. P. 8.—However, in ſuch a caſe malice may be inferred, from the maſter officiouſly ſtating trivial inſtances of the ſervant's miſconduct, in order to prevent him from getting a ſecond character from a former maſter, and then himſelf giving him a bad character, the truth of which he is not able to prove. Rogers *v.* Clift, 3 Boſ. and Pul. 587. It is the ſubject neither of a criminal proſecution, nor of a civil action, to publiſh a true account of the proceedings of courts of juſtice, or of the houſes of parliament, however injurious ſuch publication may be to the character of an individual. Curry *v.* Walter, 1 Boſ. and Pul. 525. Rex *v.* Wright, 8 T. R. 293. 298. Nor is an advertiſement in a newſpaper, though injurious to the character of a perſon mentioned in it, to be conſidered libellous, if it is inſerted *bonâ fide*, as with a view of inveſtigating a fact, in which the party making it is intereſted. Delaney *v.* Jones, 4 Eſp. N. P. Caſ. 191. And it is decided that an action will not lie for words innocently read as a ſtory out of a book, however falſe and defamatory they may be. Thus where a clergyman in a ſermon recited a ſtory out of *Fox's Martyrology*, that one G. being a perjured perſon and a great perſecutor, had great plagues inflicted upon him, and was killed by the hand of God; whereas in truth, he never was ſo plagued, and was himſelf actually preſent at that diſcourſe, —the words being delivered only as matter of hiſtory, and not with any intention to ſlander, it was adjudged for the defendant. Cro. Jac. 91.—It ſeems now ſettled that in theſe caſes the requiſite evidence in bar of the action may be given under the general iſſue of *not guilty*.. 1 Williams's Saund. 131. (1)—*Vide* Thompſon *v.* Bernard, *ante* 48.

DUDLEY

DUDLEY *v.* VAUGHAN.

Monday, April 25th.

THIS was an action of treſpaſs, to try the validity of a commiſſion of bankrupt iſſued againſt the plaintiff, which was impeached on the ground that there had been no act of bankruptcy.

If a trader is denied, when at home, to a creditor who merely demands payment of a debt, but does not aſk to ſee him perſonally, this is not evidence of *a beginning to keep houſe* ſo as to conſtitute an act of bankruptcy. But if a trader withdraws from one part of his houſe where he had before uſually ſate, and where there was free acceſs to him, to a more retired part of it, to avoid perſonal applications for money, by means whereof his creditors are prevented from importuning him, this is *a beginning to keep houſe* within the meaning of the ſtatute.

q. Cooke 487.

On the part of the defendant it was alledged, that the plaintiff had committed a clear act of bankruptcy on the 26th of Dec. 1806, by *beginning to keep houſe with intent to delay his creditors*, which was to be evidenced, 1ſt. by his being denied to a creditor on that day, 2dly, by his removing to a ſecluded parlour, from that part of his houſe where he had formerly ſate, and where people on buſineſs had been accuſtomed to have acceſs to him.

As to the firſt fact, it appeared that the creditor, to whom the denial was ſuppoſed to have been given by the plaintiff's clerk, had only demanded payment of a debt, but had not aſked to ſee the plaintiff perſonally, and that the clerk, ſuppoſed to give the denial, had no ſpecific directions for doing ſo.—The ſecond fact, however, was ſatisfactorily eſtabliſhed by proof, that the plaintiff had been in the conſtant habit of ſitting, during buſineſs, hours in his counting houſe on the ground floor, where there was a ready acceſs to him, till the 26th of December; that on this and ſeveral following days he did not appear in

the counting houſe at all, but ſate in a parlour above ſtairs; that his circumſtances were then very much embarraſſed; that about mid-day on the 26th he deſired his clerks to ſay to any of his creditors who ſhould call, that on account of the ſtoppage of a houſe in Ireland, he was obliged to ſuſpend his payments; and that this meſſage was delivered to ſeveral of them who did call.

Lord ELLENBOROUGH. The denial in this caſe cannot be conſtrued into an act of bankruptcy. Even ſuppoſing the plaintiff to have been at home when the creditor called, and that the clerk ſaid he was abroad, or gave ſome fraudulent or evaſive excuſe for his not appearing, yet as the creditor never aſked for him, or expreſſed any wiſh to ſee him perſonally, the denial is no evidence of his beginning to keep houſe to avoid the juſt and reaſonable importunity of his creditors.—But though an authoriſed denial to a creditor requiring to ſee his debtor, is the moſt uſual and familiar evidence of *beginning to keep houſe* within the meaning of the ſtatute, it is not the only evidence by which this may be proved. If a trader has no ſervant, the act cannot be evinced through ſuch a medium. In that caſe, if he ſhuts himſelf up in his houſe, debarring all acceſs to it, whereby his creditors are delayed, an act of bankruptcy is eſtabliſhed by proof of his having done ſo. And generally, if a trader ſecludes himſelf in his houſe to avoid the fair importunity of his creditors, who are thus deprived of the means of communicating with him, he *begins to keep houſe* within the meaning of the

the legiſlature, and commits an act of bankruptcy. —Here the queſtion muſt turn chiefly upon the intent. It clearly appears that the plaintiff changed his uſual place of ſitting, and that ſeveral of his creditors who called and muſt have found him, had he remained there, went away without ſeeing him. Therefore if he withdrew from the counting houſe to the parlour for privacy and ſecluſion, and with a view to avoid the perſonal ſolicitation of his creditors, by ſo doing he committed an act of bankruptcy, and this action cannot be ſuſtained.

The jury found a verdict for the defendant.

The *Attorney General*, *Garrow*, and *Storks* for the plaintiff.

Park, and *Marryat* for the defendant.

[Attornies, *Williams* and *Eaton*.]

Vide Co. B. L. c. 4. where the caſes on this ſubject are collected and arranged.

SPEPHERD

Same Day.

SHEPHERD *v.* CHEWTER.

An *adjuſtment* is not binding on an underwriter, although at the time of ſigning it he had the means of rendering himſelf acquainted with the hiſtory of the voyage and the manner of the loſs, if his attention was not then drawn to circumſtances he afterwards learns, by which the underwriters were diſcharged.

ASSUMPSIT on a policy of inſurance on goods on board the Aſtrea, at and from Liverpool to Trieſte or Venice, with or without letters of marque. The loſs was laid to be by capture.

The plaintiff gave in evidence, an adjuſtment on the policy ſigned by the defendant; and proved that previouſly to its being ſigned, an account had been poſted up at Lloyd's coffee-houſe, which the defendant muſt have ſeen, ſtating that the ſhip on her way out had *chaſed every thing ſhe ſaw*, and had been at laſt captured in the gut of Gibraltar, through the cowardice and miſmanagement of the maſter. The defendant when he ſigned the adjuſtment ſaid, it was not likely the ſhip ſhould have been loſt by cowardice, when the captain was killed in the engagement.

On the part of the defendant it was proved, that the ſhip from the time of her ſailing from Liverpool had been in the conſtant habit of cruizing for prizes; and therefore it was contended, on the authority of Lawrence v. Sydebotham, 6 Eaſt 45, and Parr v. Anderſon, 6 Eaſt 202, that ſhe had been guilty of a deviation which diſcharged the underwriters.

Park, for the plaintiff, inſiſted that the only defence which could now be ſet up was, that ſome fraudulent conceal-

concealment had been practiſed upon the defendant when he ſigned the adjuſtment; but the notice mentioning that the ſhip had chaſed every thing, ſufficiently informed him of the ſuppoſed deviation, and the adjuſtment ſubſequently ſigned was therefore concluſive againſt him.

Lord ELLENBOROUGH ſaid the adjuſtment was *primâ facie* evidence againſt the defendant; but it certainly did not bind him, unleſs there was a full diſcloſure of the circumſtances of the caſe; unleſs they were all blazoned to him as they really exiſted. Therefore if it ſhould be thought that the defendant, by reading the notice ſtuck up at Lloyd's, had his attention drawn only to the manner in which the ſhip was captured, and was not rouſed to the previous deviation with which he afterwards became acquainted, his liability to the aſſured would be diſcharged notwithſtanding the adjuſtment. His remark when he ſigned the adjuſtment ſeems to ſhew, that he had then only conſidered the conduct of the maſter at the moment of the capture; and the expreſſion of the *ſhip having chaſed every thing* did not of neceſſity imply a deviation, ſince from carrying a letter of marque ſhe might be conſidered as at liberty to chaſe, ſo that ſhe continued in the direct line of the voyage.

Verdict for the defendant.

Park and *Scarlett* for the plaintiff.

The

The *Attorney General* and *Marryat* for the defendant.

[Attornies, *Milne*, and *Dunn & Co.*]

Vide Herbert *v.* Champion, *ante* 134, in which I understood Lord ELLENBOROUGH, C. J. to hold, that the underwriter at any time before *paying* the loss may take advantage of whatever grounds of defence his case offers, although he was actually aware of them when he signed an adjustment on the policy.—In the present case it was not essential to consider that point, the defendant when he signed the adjustment having evidently been ignorant of the *cruising*. But even had he then been fully acquainted with all the circumstances of the voyage, I may be allowed to say, that I do not perceive how the adjustment could have concluded him. From the moment of the deviation the policy was vitiated, and the defendant was discharged from all the responsibility he had incurred by underwriting it. The first contract being at an end, he may be supposed to have entered into a fresh one by putting his initials to the adjustment; but this promise is clearly without consideration, as he was no more liable upon the policy than an indifferent person who never saw it. *Ex nudo pacto non oritur actio.*—The reason for which adjustments have been introduced into the business of maritime insurance, I believe is, that upon the underwriter signing an adjustment, time is given him by the assured to pay the money: but it has been long settled in our courts of justice, that forbearance of suit, where originally there was not any cause of action, is not a consideration to support an assumpsit. Tooley v. Windham, Cro. Eliz. 206. Barber *v.* Fox, 2. Saund. 136. Loyd *v.* Lee, Stra. 94. Although *an adjustment* may be considered a mercantile instrument, which, like a bill of exchange, *primâ facie* imports consideration, it is not easy to imagine how, upon principles of law the defendant should be debarred from shewing, that in fact it was entirely without consideration; or how greater efficacy can be given to it, than to transfer the burthen of proof from the assured to the underwriter.—When money has been actually *paid*, with a full knowledge of all the circumstances of the case, the convenience of mankind re-

quires that the party paying it should be estopped from contesting his liability; but the dictates both of law and public policy seem to forbid that the real merits of the question should be shut out by the mere gratuitous promise or acknowledgment of either of the parties.—Rann *v.* Hughes, 7 T. R. 350. *n.* 3 Bos. & Pul. 249 (*a*). Plowd. 305. 308. Marriott *v.* Hampton, 7 T. R. 269. Bilbie *v.* Lumley, 2 East, 469. Fisher *v.* Samuda, *ante* 190.

RICHARDSON AND ANOTHER *v.* SMITH.

Same Day.

In an action for a deceitful representation of the credit of a third person, that person is a competent witness for the plaintiff.

THIS was an action on the case for a deceitful representation by the defendant, of the credit of one James Hantler, whereby the plaintiffs had been induced to trust him with goods to a large amount, the price of which, from his insolvent circumstances, he was unable to pay.

The first witness offered on the part of the plaintiffs, was Hantler himself.

Park objected to his competency on the score of interest. If the plaintiffs recovered in this action, they would receive satisfaction for the debt due to them from the witness; and as, in consequence of the verdict, he would not be liable to an action for the price of the goods, he would in fact be swearing in his own discharge, and must be conceived to have such a bias upon his mind as completely to disqualify him.

Lord ELLENBOROUGH.—How can this record be evidence for him in another action? I am aware of the case of Bird v. Randall (*a*); but I do not think that the witness has any interest in the event of this suit to render him incompetent.

It afterwards appeared that the defendant had merely represented Hantler as an honest man, and a man of business, which there seemed no reason to doubt, although his circumstances had become embarrassed.—The plaintiffs therefore submitted to be nonsuited.

The *Attorney General*, *Garrow*, and *Comyn* for the plaintiffs.

Park and *Lawes* for the defendant.

[Attornies, *Laing* and *Dobie*.]

(*a*) 3 Burr. 1345. 1 Bl. Rep. 373, 387, S. C.—in which it was held, that an action does not lie at the suit of a master for seducing his servant, after the servant has paid him the penalty stipulated by his articles for leaving him; the penalty being considered a full satisfaction for the injury he had suffered.

RAMSBOTTOM AND OTHERS *v.* LEWIS AND OTHERS.

Tuesday, April 26.

THE plaintiffs declared as indorſees againſt the defendants as acceptors of a bill of exchange, dated 12th November, 1806, drawn by *certain perſons commonly called or known by the names and uſing the ſtile and firm of Meſſrs. Moffatt and Co*, payable, two months after date to their own order, and indorſed by the ſaid *Meſſrs. Moffatt and Co.* to the plaintiffs.

If the neceſſary conſequence of a trader's departing the realm is, that his creditors muſt be delayed, he thereby commits an act of bankruptcy; ſince a man is to be conſidered as foreſeeing and meaning to bring about the neceſſary conſequences of his own acts. After a ſecret act of bankruptcy committed by one of two co-partners, the other cannot by an indorſement in the name of the firm, transfer negotiable ſecurities, which exiſted before the act of bankruptcy.

The plaintiffs are bankers, with whom Meſſrs. Moffatt and Brown, (partners under the firm of Meſſrs. Moffatt and Co.) kept caſh. The bill in queſtion was drawn by Brown in the partnerſhip firm, and being indorſed by him in the ſame manner, was paid in by him as a ſhort bill to the plaintiffs, who allowed him to draw upon them on the ſtrength of it. Before the indorſement Moffatt, without the knowledge of his co-partner, had ſailed for the continent, under an aſſumed name, with a lady, whom he had carried off from her huſband. When the bill became due, the defendants refuſed to pay it to the plaintiffs, under a notice they had received from the aſſignees of Moffatt and Brown, againſt whom a joint commiſſion of bankrupt had previouſly iſſued. There was no evidence as to the embarraſſed ſtate of the partnerſhip concerns before Moffatt's departure.

Garrow for the plaintiffs contended, that nothing which had appeared impeached their title as indorſees of the bill. In the firſt place, Moffatt by going abroad for the purpoſes of criminal gallantry, had not committed an act of bankruptcy. There was no reaſon to ſuppoſe that *delaying his creditors* was at all in his contemplation, which was neceſſary to make departing the realm different in its conſequences, in this reſpect from his remaining in his counting-houſe. But even ſuppoſing that he had committed a ſecret act of bankruptcy, this would not affect the rights of his ſolvent partner, who knew nothing of it, and who therefore retained a power of diſpoſition over the partnerſhip effects (*a*).

Lord ELLENBOROUGH.—Whether Moffatt committed an act of bankruptcy by departing the realm, depends upon what are ſuppoſed to have been his intentions at the time. To make this an act of bankruptcy he muſt *eo inſtanti* have contemplated the defrauding or delaying of his creditors. A perſon, however, may be ſuppoſed to foreſee and to intend whatever is the neceſſary conſequence of his own acts; and if the neceſſary conſequence of Moffatt's going abroad was that his creditors ſhould be delayed, then I think he committed an act of bankruptcy. But the caſe will be otherwiſe, if this neither was his principal object, nor from his leaving a partner behind him, or from any other circumſtance, was it neceſſarily in

(*a*) Fox *v.* Hanbury, Cowp. 445.

his contemplation as an effect of the line of conduct he was purſuing. Had there been proof of his being preſſed by debts at the time, I ſhould not have heſitated in ſaying, that he had committed an act of bankruptcy; but as the evidence ſtands it is a queſtion for the jury (*a*)—If one partner had committed an act of bankruptcy before the indorſement, this action certainly cannot be maintained. The declaration ſtates that both partners drew and *indorſed* the bill; but upon this laſt ſuppoſition, at the time of the indorſement one partner had no longer any intereſt in it, and was incapable of exerciſing any act of ownerſhip over it. The partnerſhip had in fact then ceaſed to exiſt, and the ſolvent partner was to be conſidered as tenant in common of the bill along with the aſſignees of the other. Nor, as the declaration now ſtands, would it be enough to ſhew that the bankruptcy of Moffatt took place before the bill was drawn; for though in that caſe it might have been declared upon as the bill of Brown alone, ſtill both are ſtated as joint parties to it (*b*).

The

(*a*) *Vide* Woodier's caſe, Bull. N. P. 39. Raikes *v.* Poreau, Co. B. L. 73. Vernon *v.* Hankey, Co. B. L 98. Fowler *v.* Padget, 7 T. R. 509.

(*b*) According to the caſe of Abel *v.* Sutton, 3 Eſp. Caſ. 108. if Brown had remained ſolvent, and a commiſſion had been taken out againſt Moffatt, the property in the bill could only have been transferred by the reſpective indorſements of the aſſignees and the ſolvent partner. Lord Kenyon there ſays, "If a fair bill exiſted at the time of the partnerſhip, but is not put into circulation until after the diſſolution, all the partners muſt join in making it negotiable. The mo-

The jury found a verdict for the defendants.

Garrow and *Walton* for the plaintiffs.

Park and *Lawes* for the defendants.

[Attornies, *Walton* and *Wiltshire*]

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ment the partnership ceases the partners become distinct persons: they are tenants in common of the partnership property undisposed of from that period; and if they send any securities which belonged to the partnership into the world after such dissolution, all must join in doing so."

Same Day.

SMITH AND ANOTHER *v.* GOSS.

If A. sells goods to B. and according to B's directions sends them to C. a wharfinger, to be by him forwarded to B.; while they are in C.'s hands they may be stopped *in transitu* by A. —The right of a consignor to stop goods *in transitu* is not divested by the goods, while in their transit, being attached by process out of the court of the Mayor of London at the suit of a creditor of the consignee.

TROVER to recover the value of certain packages of hardware.

On the 18th of July 1807, *Scaife*, a merchant at Newcastle, wrote a letter to the plaintiffs, who are manufacturers at Birmingham, ordering the articles in question, and directing them to be forwarded to him at Newcastle, either by way of London or Gainsborough, as the plaintiff might think they would reach him the soonest. The letter concluded by saying, "If they are sent to London, address them to the care of J. W. Goss (the defendant), Bull Wharf, with directions to

send

ſend them by the firſt veſſel for Newcaſtle." On the 9th of Auguſt the plaintiffs accordingly ſent the goods to the defendant to be by him forwarded to Scaife, and they were delivered to him on the 17th, 19th, and 22d of that month. On the 24th of the ſame month the plaintiffs received a letter from Scaife, ſtating that he had become inſolvent, and that he declined to accept goods, which he found he ſhould be unable to pay for. They immediately wrote to the defendant to ſtop the goods on their account. The defendant in anſwer informed them that the goods were attached in his hands by proceſs out of the Mayor's court of London, at the ſuit of a creditor of Scaife's, and therefore he could not deliver them to the plaintiffs. In fact this proceſs of attachment was ſerved upon the defendant on the 18th of Auguſt, when a part only of the goods had arrived; and as he refuſed to allow the plaintiffs to enter an appearance, and defend the attachment in his name (which they had offered to do) interlocutory judgment was ſigned againſt him as garniſhee on the 10th of October, and final judgment was entered up on the 11th of December.

It was contended that, under theſe circumſtances, an action could not be ſupported at the ſuit of the conſignors of the goods, as they either abſolutely veſted in the aſſignees of Scaife, or at any rate the right to ſtop them *in tranſitu* was ſuperſeded by the attachment in the Mayor's court. But

Lord ELLENBOROUGH held the plaintiffs entitled to recover; as the goods having been ſent to the

defendant for the purpoſe of being forwarded to Newcaſtle, were merely at a ſtage upon their tranſit, and could not be conſidered as having reached their final deſtination when at the wharfinger's in London.—He alſo held that the right of the vendors to ſtop *in tranſitu* could not be defeated by the proceſs out of the Mayor's court at the ſuit of the attaching creditor, who could have no greater right in the goods than Scaife himſelf. The vendor's power of intercepting the goods was the elder and preferable lien, and not ſuperſeded by the attachment, any more than it would have been by the general right of a common carrier to retain all his cuſtomer's goods for his general balance, which had been decided againſt the carrier.

The plaintiffs therefore had a verdict.

The *Attorney General* and *Marryat* for the plaintiffs.

Garrow and *Eſpinaſſe* for the defendant.

Vide Dixon v. Baldwin, 5 Eaſt, 175.—Mills v. Ball, 2 Boſ. & Pul. 457.—Hodgſon v. Loy, 7 T. R. 440. — Oppenheim v. Ruſſell, 3 Boſ. & Pul. 42. Graff v. Greffulhe, *ante* 89.

COURT

COURT OF COMMON PLEAS.

SITTINGS AFTER TERM AT WESTMINSTER.

ANSCOMB *v.* SHORE.

Tuesday, February 16.

THIS was a ſpecial action on the caſe for detaining the plaintiff's cattle in the pound, after a tender of amends; and for not repairing a fence.

An action on the caſe will not lie for detaining cattle diſtrained and impounded, where a tender of amends was not made till after the impounding. And *commenſurable* ſuch an action could not be ſupported, even if the tender of amends had been made before the impounding; as the proper mode to try the validity of a diſtreſs is by action of replevin or treſpaſs.

1 Bing. 341 ac

The firſt count of the declaration, after ſtating that the defendant had diſtrained the plaintiff's cattle *damage feaſant* in a cloſe of the defendant, went on to aver, that the plaintiff afterwards, and whilſt the defendant was in poſſeſſion of one of the ſaid cattle, under ſuch diſtreſs as aforeſaid, to wit, on &c. at &c. tendered and offered to the defendant, in ſatisfaction and diſcharge of the ſaid damage and of the coſts and charges of the ſaid diſtreſs, a certain ſum of money, to wit the ſum of 10*s.* the ſame being then and there a ſufficient ſum to ſatisfy and diſcharge the damage aforeſaid, together with all the coſts and charges of the ſaid diſtreſs; and the plaintiff then and there requeſted the defendant to redeliver and reſtore the ſaid cattle to the plaintiff; and although the defendant then and there could and might and ought to have accepted and

and received the ſaid ſum of money from the plaintiff, in diſcharge of ſuch damage, coſts and charges, and to have re-delivered and reſtored the ſaid cattle to the plaintiff; yet the defendant contriving to harraſs, oppreſs and aggrieve the plaintiff in this behalf, did not nor would, when he was ſo requeſted as aforeſaid, or at any other time, accept or receive the ſaid ſum of money from the plaintiff in ſatisfaction and diſcharge of the ſaid damage, and of the coſts and charges of the ſaid diſtreſs; but kept and detained the ſaid cow, and refuſed to reſtore or redeliver the ſame, until the plaintiff, in order to obtain and regain poſſeſſion of his ſaid cow, was forced and obliged to pay to the defendant, a greater and unreaſonable ſum, to wit the ſum of 5*l.* 5*s.* for the ſuppoſed damage alleged to have been done by the ſaid cattle, as laſt aforeſaid, and by means of the ſaid detention, &c. the ſaid cattle became and were greatly damaged, &c.

Beſt, Serjeant, having opened the caſe, and urged that the ſum tendered exceeded the amount of the damage actually done; that it was the defendant's duty to have accepted it by way of amends; that although the law gave the ſummary remedy of diſtreſs to the party grieved, it was only for the purpoſe of compelling ſatisfaction; that the detention of the cattle after an offer of this was therefore tortious; and that in this action for the tort the plaintiff would be entitled, at any rate, to recover back the ſum of five guineas which he had been illegally forced

to

to pay before he could procure the reſtoration of his cattle;—

Sir JAMES MANSFIELD, C. J. aſked if there was any precedent for ſuch an action. It appeared to him that, in caſes of this ſort, the law had pointed out the ſpecific remedy of replevin, which the party grieved was bound to purſue. The plaintiff here complained of his cattle being detained from him, and being obliged to pay a ſum of money to redeem them; whereas by ſuing out a replevin he might have got them back into his cuſtody almoſt immediately after they were impounded. But it would be a dangerous innovation, it would be introducing a new proceſs into the law, to try the legality of diſtreſſes in an action ſuch as this. He believed, indeed, that in a caſe in Cowper this very point had been decided (*a*).

It was then obſerved, on the part of the plaintiff, that he could not have maintained replevin, as the

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(*a*) Lindon *v.* Hooper, Cowp. 414, in which his Lordſhip, then practiſing in the court of K. B. was counſel for the defendant, and in which it was held that an action *for money had and received*, does not lie to recover back money paid for the releaſe of cattle taken damage feaſant, though the diſtreſs were wrongful; the proper remedy being treſpaſs or replevin, and aſſumpſit being conſidered an unjuſtifiable attempt to deprive the defendant of the advantages which in thoſe actions he would derive from the rules of ſpecial pleading.

tender

tender of amends had not been made till after the cattle were impounded.

Sir JAMES MANSFIELD.—If ſo, there is an end of this queſtion. After the cattle were impounded, every young man who has read *Coke-Littleton* knows, the tender came too late. They were then in the cuſtody of the law, and there could be no tort committed by the defendant in detaining them.

The plaintiff's counſel argued, that though the tender came too late to render the taking illegal, or to have ſupported an action of replevin, ſtill the defendant was bound to accept it when it was made, and to have reſtored the cattle, which continued under his controul, and which he had, in fact, reſtored after extorting a ſum of money from the plaintiff. On any other ſuppoſition, the plaintiff was entirely remedileſs, whatever oppreſſion had been practiſed upon him. He could not maintain replevin, having no ſufficient plea in bar to the defendant's avowry; and if 100*l.* had been aſked from him he muſt either have paid it or abandoned his cattle. Nay, according to this doctrine, the defendant might have refuſed to part with them on any terms. But it was impoſſible that ſuch a wrong ſhould be without a remedy; and the proper remedy was an action on the caſe.

Sir JAMES MANSFIELD ſaid, that after the cattle were impounded and in the cuſtody of the law, there could

could be no tort on the part of the defendant in detaining them; and therefore, unleſs there was evidence given in ſupport of the other counts of the declaration, he ſhould nonſuit the plaintiff (*a*).

(*a*) Lord Coke in a few words ſums up the law upon this ſubject with great perſpicuity, and removes the difficulty of the perſon whoſe cattle are rightfully diſtrained being entirely without remedy, if the diſtrainor refuſes to accept of reaſonable amends tendered after the impounding. "Note, reader, this difference, That tender upon the land before the diſtreſs makes the diſtreſs tortious; tender after the diſtreſs and before the impounding makes the detainer and not the taking wrongful; tender after the impounding makes neither the one nor the other wrongful; for then it comes too late; becauſe then the cauſe is put to the trial of the law, to be there determined. *But after the law has determined it, and the avowant has return irrepleviſable, yet if the plaintiff makes him a ſufficient tender, he may have an action of detinue for the detainer after: or he may, upon ſatisfaction made in court, have a writ for the delivery of the goods.*" Six Carpenters caſe, 8 Co. 147 a. So Gilbert, C. B. ſays, "The detainer is unlawful, where the avowant hath return irrepleviſable, and the owner of the beaſts tenders all that appears to be due on the judgment in the avowry; for though by the judgment the return is made irrepleviſable, yet that is no final condemnation of the beaſts or goods diſtrained; they are ſtill to be conſidered as pledges in the hands of the avowant, and therefore in their own nature liable to a redemption upon payment or ſatisfaction of that rent or damage, for which they were originally taken" Gilb. Diſt. 61.—*Vide* 2 Inſt. 107,—5 Co. 76 a. Roberts *v.* Young, 1 Brownl. 173.—Vaſpor *v.* Edwards, 12 Mod. 661.—Allen *v.* Bayley, 2 Lutw. 1596.

There

In an action at the ſuit of a tenant claiming a right of common over a piece of waſte land, againſt the owner of an adjoining cloſe, for not repairing an intervening fence, the landlord under whom the plaintiff holds the premiſes, in reſpect of which he claims the right of common, is not a competent witneſs to prove the right. Neither in ſuch an action are others who have a ſimilar right of common, competent witneſſes for that purpoſe.

There were other counts in the declaration, for not repairing a fence between certain waſte land over which the plaintiff claimed a right of common and the defendant's cloſe; whereby plaintiff's catt depaſturing on the common, eſcaped into the cloſe and plaintiff was put to great inconvenience and expence in recovering them back.

To prove this right of common, the firſt witneſs called was the perſon under whom the plaintiff held the meſſuage and premiſes in reſpect of which he claimed the right; and who coming to ſwear what was for the advantage of his reverſionary eſtate, was, upon argument, rejected as incompetent.

Several other witneſſes were afterwards called to the ſame point; all of whom being examined on the *voire dire*, appeared themſelves to have a right of common over the land in queſtion.

Sir JAMES MANSFIELD, *C. J.* held them likewiſe to be incompetent witneſſes to prove the plaintiff's right of common; as it was their intereſt that the burthen of repairing the fence ſhould be thrown upon the defendant; and as the verdict in this cauſe would afterwards be evidence between the commoners and the owner of the adjoining cloſe.—His lordſhip, therefore, directed *a nonſuit*.

Beſt, *Sellon*, Serjeants, and *Eſpinaſſe* for the plaintiff.

Shepherd and *Bayley*, Serjeants, for the defendant.

[Attornies, *Taylor* and *Barber*.]

A rule was obtained in the enſuing term to ſhew cauſe why this nonſuit ſhould not be ſet aſide; but was afterwards diſcharged, the judges being unanimouſly of opinion that an action on the caſe would not lie for refuſing to deliver up the cattle, and that the witneſſes adduced to prove the right of common had been properly rejected —*Ut audivi*.

MAZZINGHI *v.* STEPHENSON.

Saturday, Feb. 20.

DEBT on bond.—Plea, that the bond was given to ſecure a ſum of money won by the plaintiff from the defendant at a certain game called *faro*.

If the defendant pleads to an action of debt on bond, that the bond was given for money won by gaming, and ſpecifies the name of the game at which the money was won, he muſt prove that the bond was given for money won at the particular game ſpecified.

A witneſs for the defendant ſtated, that he had delivered to the plaintiff a bond from the defendant, about the time the bond upon which the action was brought bore date, and from a converſation he then had with the plaintiff, he underſtood it to be for a gaming debt, but whether to ſecure a ſum of money loſt at *faro*, or what other game, he could not ſay.

It was thereupon contended for the plaintiff, that even ſuppoſing the bond ſo delivered was the bond declared upon, there was no evidence that it was given

given for money loſt at *faro*, and unleſs it was proved to have been ſo given the plaintiff was entitled to a verdict, the iſſue being, whether it was for money loſt at that particular game.

On the other ſide it was ſaid, that the name of the game was ſurpluſage, and that the ſubſtantive part of the iſſue was, whether the bond was given for money loſt at play.

Sir JAMES MANSFIELD, *C. J.* however, held, that the game was part of the iſſue, and directed the jury, that if they ſhould be of opinion that the bond in queſtion was that which the witneſs had delivered, they ſhould ſtill find for the plaintiff.

And the plaintiff had a verdict accordingly.

In Calborne *v.* Stockdale, Stra. 493, it was held, that where the defendant pleads that the bond was given for money won at play, he muſt ſhew at what game or play the money was loſt; as this is matter of law and not merely evidence, and the court ought to have the means of judging whether it was ſuch gaming as is contrary to the ſtatute.

SQUIRE *v.* TOD AND OTHERS.

Same Day.

THIS was an action for money had and received, to recover a depoſit of 40*l.* paid by the plaintiff to the defendants, upon the purchaſe of certain leaſehold premiſes at Clerkenwell.

In an action for money had and received, at the ſuit of a purchaſer againſt the vendor of an eſtate, to recover back the depoſit, the conditions of ſale not being complied with, the defendant, by a judge's order, may obtain *a particular* of the grounds on which the plaintiff ſeeks to recover back the depoſit; to which the latter will be confined at the trial. But if there has been no *particular*, the plaintiff may entitle himſelf to a verdict by proving an infraction of the conditions of ſale, never before mentioned to the defendant.

The plaintiff contended, that the conditions of ſale had not been complied with on the part of the vendors, as they could not make a good title to a part of the premiſes; and in ſeveral other reſpects. It appeared that the firſt objection was the only one before pointed out, and on which the plaintiff had refuſed to complete the purchaſe.

Shepherd, Serjeant, for the defendant, contended, that this was the only objection on which the plaintiff could now inſiſt. The defendants had never heard of any other, and could not poſſibly come prepared to meet others now ſtarted for the firſt time. If theſe had been before pointed out, perhaps ſome of them might have been conſidered valid, whereupon the depoſit would have been returned. But to ſuffer a purchaſer at an auction to break off the bargain on one pretext, and then at the trial to bring forward freſh grounds for his breach of contract, would only be to entrap thoſe who wiſhed to deal honeſtly, and to encourage fraud and litigation.

Sir JAMES MANSFIELD C. J. ſaid, the defendant might have had a particular of the grounds on which the plaintiff ſought to recover back the depoſit. He certainly on being applied to, in a caſe like this, would have made an order for ſuch a particular, and would have confined the plaintiff to the grounds ſtated in it at the trial. But as things actually ſtood, he conceived the plaintiff would entitle himſelf to a return of the depoſit, on proving any of the conditions of ſale to have been broken on the part of the defendants, unleſs they could ſhew a waiver on his part. The plaintiff was at liberty to ſhew that the contract was reſcinded, in which caſe the depoſit became money had and received to his uſe.

The cauſe was afterwards referred.

Marſhall, Serjeant, and *Lawes*, for the plaintiff.

Shepherd and *Runnington*, Serjeants, for the defendants.

[Attornies, *Holloway* and *Rogers*.]

In Collett *v.* Thompſon, 3 Boſ. and Pul. 246, which was aſſumpſit for non-performance of a contract for the ſale of a houſe, the plaintiff having in his firſt count alleged that the defendant, who was to make a good title, had delivered an abſtract, which was "inſufficient, defective, and objectionable," the court of C. P. obliged the plaintiff to give a particular of all objections to the abſtract on which he meant to rely, ariſing from matters of fact,

act, but ſaid he was not bound to ſtate in his particular any objections in point of law.—It ſeems now ſettled that a particular may be had in every caſe where from the generality of the pleadings the parties could not otherwiſe come prepared to trial. *Vide* Tid. Prac. 526, 7 4th ed.

WETHERDEN *v.* EMBDEN.

Wedneſday, Feb. 24.

THIS was an action on the caſe for maliciouſly holding the plaintiff to bail.

If in an action for a malicious arreſt, the declaration avers that B. the defendant had no cauſe of action againſt A. the plaintiff to the amount of 10*l.* and it appears that A. was indebted to him above that ſum, although not nearly to the amount ſworn to in the affidavit to hold to bail; the action cannot be ſupported; as A. ſhould have declared againſt B. for maliciouſly holding him to bail for a greater ſum than was really due. But if in fact B. was largely indebted to A. on a balance of accounts and had only a croſs demand upon him for a different cauſe from that mentioned in the affidavit to hold to bail, then the above averment is not falſified, as in that caſe A. did not owe B. 10*l.* and B. had no cauſe of action for which he could lawfully hold A. to bail.

The declaration, after ſtating the ſuing forth of a *capias ad reſpondendum* by the defendant, indorſed to hold the plaintiff to bail for 1880*l.*; the arreſt of the plaintiff under it for that ſum; and the giving of a bail bond conditioned for his appearance at the return of the writ—contained the following averment: "Whereas in truth and in fact the ſaid defendant, at "the time of ſuing forth the ſaid writ and of the "ſaid arreſt and impriſonment, had not any reaſon-"able or probable cauſe of action againſt the ſaid "plaintiff to the amount of 10*l.* or upwards, or where-"by or for which he the ſaid plaintiff, by the law of "this realm or by the practice of the ſaid court of "our ſaid lord the King of the Bench, could or ought

"to have been arreſted or holden to bail as afore-
"ſaid."

It appeared that Embden had made an affidavit that Witherden was indebted to him in the ſum of 1880*l.* and upwards for money had and received and money paid, laid out, and expended; and that at this time Embden was himſelf indebted to Witherden, upon a balance of accounts, upwards of 2000*l.*; but that Embden had then a demand upon Witherden to the amount of about 100*l.* for commiſſion on the ſale of timber.

Shepherd, Serjeant, for the defendant, contended, that under theſe circumſtances this action could not be ſupported. The exiſtence of a debt of 100*l.* due from the plaintiff to the defendant completely negatived the averment in the declaration, that the defendant had not any reaſonable or probable cauſe of action againſt the plaintiff to the amount of 10*l.* or for which the plaintiff could be arreſted. He allowed that maliciouſly holding a perſon to bail for a larger ſum than was due would be actionable, and that if this had been done in the preſent caſe, the declaration might have been ſo framed as to embrace it. But the injury complained of was, being arreſted, not for a larger ſum than was due from the plaintiff, but when he owed no ſum for which he could have been arreſted at all. That was clearly a charge quite of a different nature from the other, and to meet it the defendant was called upon to come prepared with quite different evidence.—This very point had been decided

decided in the caſe of *Wilkinſon v. Mawbey*, Bart. which he believed was not in print, but in which he had himſelf been counſel for the plaintiff, and of which from particular circumſtances he had a very accurate recollection. That likewiſe was an action for a malicious arreſt, and the declaration averred that the defendant had no cauſe of action againſt the plaintiff, for which the latter was liable to be held to bail. At the trial, which came on before the late Mr. Juſtice *Gould* at the Surrey Aſſizes, it was proved that the defendant, Sir Joſeph Mawbey, had maliciouſly held the plaintiff to bail for a far larger ſum than was due, but that the plaintiff at that time owed him ſomewhere about 12*l.* *Gould, J.* allowed the trial to proceed, and the plaintiff recovered a verdict with very heavy damages. This verdict, however, was afterwards ſet aſide by the court of K. B. upon the ground that the plaintiff had not proved the injury of which he complained in his declaration.

Beſt, Serjeant, contended, that the averment was immaterial and might be rejected as ſurpluſage. It would have been enough for the plaintiff to have declared that the defendant maliciouſly, and without any reaſonable or probable cauſe, held him to bail for 1880*l.* without adding that no ſum to the amount of 10*l.* was really due. And there could be no doubt that the evidence which had been adduced would have ſupported ſuch a declaration; as even allowing the plaintiff to have owed the defendant 100*l.*, that debt afforded no probable cauſe for holding the plain-

tiff to bail for 1880*l.* and could not rebut the presumption of malice which such conduct necessarily raised. Besides, it could not be said that the defendant had a cause of action against the plaintiff to the amount of 10*l.* for which he could legally hold him to bail, as he himself then owed the plaintiff upwards of 2,000*l.*

Sir JAMES MANSFIELD seemed to acquiesce in the authority of *Wilkinson v. Mawbey*; but thought that the defendant's demand for commission was, nevertheless, no sufficient answer to the action in its present shape. The affidavit was for money had and received and money paid, not for money due as commission on the sale of timber; and this demand, though a set off to a certain extent, constituted no debt for which he could lawfully hold the plaintiff to bail, there being a very large balance against him on the general settlement of accounts.

The jury found a verdict for the plaintiff, with 200*l.* damages.

Best, *Onslow*, Serjeants, and *Abbott* for the plaintiff.

Shepherd, Serjeant, and *Wigley* for the defendant.

[Attornies, *Rogers* and *Bishop*.]

"If one has a cause of action "to a small sum and take out "a latitat for a very great sum, "an action on the case lies; but "then

"then 'tis not enough to de-
"clare generally, that he brought
"an action againſt him, *ex ma-*
"*licia, et ſine cauſa, per quod* he
"put him to great charge, &c.
"but he muſt ſhew the grievance
"ſpecially as in *Sid.* 424 *ſc.*
"whereas he owed him, the de-
"fendant, 100*l.* he ſued him for
"500*l.* and to hinder him from
"bail, affirmed to the ſheriff
"500*l.* was due; *per quod* he
"was impriſoned for want of
"bail." *Per Cur.* in Savil *v.* Roberts, 1 Salk. 14. *Vide etiam* Robins *v.* Robins, 1 Salk. 15. 1 Ld. Raym. 503. S. C. Scheibel *v.* Fairbairn, 1 Boſ & Pul. 388. Gibſon *v* Chaters, 2 Boſ. & Pul. 129. Jackſon *v.* Burleigh, 3 Eſp. Caſ. 34.

SITTINGS AFTER TERM IN LONDON.

Monday.
February 29.

EVANS *v.* BENNETT.

Where the plaintiff ſubſcribed articles of agreement under ſeal, between the captain of a ſhip and the mariners, whereby, in conſideration of their ſerving faithfully in a fiſhing voyage to the South Seas and back again, they were each to receive a certain ſhare of the net proceeds of the cargo brought home, and the defendant, as owner of the ſhip, was appointed agent to diſpoſe of the cargo for the benefit of all concerned; held that *money bad and received* would not lie againſt the defendant to recover the plaintiff's ſhare of the net proceeds, on proof that the defendant had diſpoſed of the cargo, and that the price of it had come to his hands; without evidence of an acknowledgment that the plaintiff had done his duty during the voyage, and was entitled to his ſtipulated ſhare of the proceeds.

INDEBITATUS aſſumpſit for plaintiff's wages as a mariner on board the defendant's ſhip, called the Mary Shuball, on a voyage to the Southern whale fiſhery, and back to the port of London; with the uſual money counts.

The plaintiff having given in evidence certain articles of agreement, under ſeal, between the captain of this ſhip, and the plaintiff together with the other mariners; whereby it was agreed that they ſhould ſerve faithfully during the voyage out and home; that if any of them deſerted, they ſhould forfeit all benefit from the voyage; that the cargo ſhould be ſold ſix weeks after the ſhip returned, or if not ſold, ſhould be valued, when each mariner ſhould receive that proportion of the net proceeds marked againſt his name; that the defendant, as owner of the ſhip, ſhould be nominated their agent to diſpoſe of the cargo for the benefit of all parties concerned; and that the officers and ſeamen ſhould receive a proportional ſhare of all prizes taken during the voyage;—

Shepherd

Shepherd and *Beſt*, Serjeants, of counſel for the defendant, objected that the action had been mis-conceived, and that the plaintiff ſhould have declared ſpecially on this agreement. There was clearly no ſum of money due as wages; for the plaintiff, according to the uſual way in fiſhing voyages to the ſouth ſeas, was to receive a ſhare of the produce of the cargo, and was, in fact, a partner in the adventure. Nor could he recover this ſhare as money had and received to his uſe; as there had been no liquidation of accounts, and no acknowledgment of any ſum being due to him. In a declaration on the agreement, the plaintiff muſt have averred that he performed his duty on board the ſhip; and this was an attempt to get rid of the proof neceſſary to ſupport ſuch an averment. Beſides, the defendant could here have no notice of the plaintiff's cauſe of action, and could not come prepared to reſiſt it, however groundleſs it might be; and where there had been ſpecial articles under ſeal, this was the firſt inſtance of indebitatus aſſumpſit being brought to recover a ſhare of the profits of the voyage.

Vaughan, Serjeant, and *Wigley*, on the other ſide, allowed they could not go on the count for wages; but contended that the plaintiff was entitled to recover under the count for money had and received. They could prove that the cargo had been ſold by the defendant, and that he had received the price of it. By the articles themſelves he was appointed agent for this purpoſe. Therefore he ſtood in the ſame ſituation as a prize agent, and it was only neceſſary for the plaintiff

plaintiff to make out a title to a part of the money in his hands. The defendant was not a party to the agreement; and although the captain might have been ſued upon it, it was ſtill open to the plaintiff to take his remedy againſt the owner.

Sir JAMES MANSFIELD, C. J.—There is no doubt that the plaintiff would here be obliged to prove that he did his duty on board the ſhip: but the count for money had and received (to which alone we can look) gives no hint of this, and affords no ſort of information as to the nature of the demand. The plaintiff claims a certain proportion of the proceeds of a voyage, in conſideration of having done his duty as a mariner, according to the ſtipulations of an agreement entered into between him and the captain of the ſhip. Ought he not then to have declared upon this agreement? The cargo may have been ſold by the defendant; but its produce, as ſoon as received, does not become money in his hands appropriated to the uſe of the mariners. If it can be proved that he has admitted that the plaintiff did his duty properly during the voyage, and that he is entitled to a ſhare of the proceeds, money had and received may do; otherwiſe, I think there ſhould have been a ſpecial declaration.

No evidence of this kind being offered, his Lordſhip directed a nonſuit.

Vaughan, Serjeant, and *Wigley*, for the plaintiff.

Shepherd

Shepherd and *Beſt*, Serjeants, for the defendant.

[Attornies, *Hill* and *Wegener*.]

The general rule ſeems to be, that where the contract, which is the foundation of the action, is contained in a deed, the deed muſt be declared upon, although without the exiſtence of any deed, the facts of the caſe would have ſupported a general action of debt or *indebitatus aſſumpſit*. Thus where there has been a charter party of affreightment, the plaintiff cannot declare in debt generally and give the deed in evidence. Atty *v.* Pariſh, 1 New. Rep. 104. But *indebitatus aſſumpſit* will lie for neceſſaries ſupplied to the defendant's wife, where the huſband and wife have ſeparated by deed, and he does not pay her the ſtipulated allowance; although the plaintiff as truſtee under the deed of ſeparation had another remedy, by ſuing the defendant upon a covenant therein, to pay to his wife or ſuch perſon as ſhe ſhould appoint, a certain weekly allowance during their ſeparation. Nurſe *v.* Craig, 2 New. Rep. 148. *Vide* Com. Dig. tit. "*Action upon the caſe upon aſſumpſit.*" (H. 3).—Wms. Saund. 352.

CROSBY *v.* PERCY. Same day.

1. Taunt. 364. 2. Camp. 282.

An aſſignee of a leaſe, to ſhew his intereſt in the premiſes, is bound to prove the execution of the leaſe, and all the meſne aſſignments.

ASSUMPSIT upon a ſpecial agreement, by which the defendant agreed to purchaſe of the plaintiff the reſidue of a term in a public houſe. The plaintiff was the third or fourth aſſignee of the term, and it was contended by his counſel, that he need only prove the execution of the laſt aſſignment.—But

Sir JAMES MANSFIELD, C. J. held that the leaſe and all the meſne aſſignments muſt be proved (*a*).

What ſufficient evidence of the atteſting witneſs to a deed being out of the country, to let in evidence of his handwriting.

To prove one of the aſſignments evidence was given that inquiry had been made after the ſubſcribing witneſſes *two days* before the trial, as well at his own houſe as at that of his father and the neighbours; the anſwer to which inquiries was, that he had run away.

The CHIEF JUSTICE, upon this, received evidence of his handwriting.

And the plaintiff had a verdict.

(*a*) But in an action againſt a leſſee bythe aſſignee of the reverſion, proof of the leſſee having paid rent to the aſſignee is ſufficient evidence of the aſſignment. Doe *v.* Parker, Cor. Lord Kenyon, Stafford Sum. Aſſ. 1788, Peak. Law Ev. 267.

HOME CIRCUIT.

LENT ASSIZES, 48 GEORGE III. 1808.

At Chelmsford.—Coram Heath, J.

Newman Esq. *v.* Morgan.

Tuesday, March 8.

THIS was a ſpecial action on the caſe againſt the farmer of the tithes of the pariſh of Hornchurch, in the county of Eſſex, for not carrying away the tithe of hay, which had grown on certain cloſes within the pariſh occupied by the plaintiff.

Before ſetting out the tithe of hay, the occupier of the ſoil is bound at common law to *tedd* the graſs, (or throw it abroad from the ſwathe and gather it together again) and then to make it into cocks; after which, the tithe is to be ſet out, and the parſon muſt make it into perfect hay.

The queſtion between the parties was, whether the tithe had been ſet out in a proper ſtage of making the graſs into hay.—The witneſſes ſtated, that it was put into cocks, ſome immediately upon being mowed, ſome a day or two after, but all of it directly out of the ſwathe made by the mower. The tenth of theſe cocks was then ſet out, of which the defendant had due notice.

Heath, J. expreſſing a ſtrong opinion that the occupier of the land is bound to make the hay to a certain degree; before ſetting out the tithe,—

Garrow,

Garrow, for the plaintiff, contended, that though there might be ſuch a cuſtom in particular pariſhes, in general the pariſhioners were only bound to cut graſs, and to lay it into heaps or cocks, and that the parſon himſelf muſt make his tithe into hay. Where a contrary cuſtom prevailed, the parſon was only entitled to the eleventh cock, or ſome peculiar advantage was given to the pariſhioners,—ſuch as that the *aftermath* ſhould be free from tithe, as a conſideration for the trouble caſt upon them. The general principle of tithing was, that the tithe-owner ſhould have the tenth part of the produce, upon its being ſeparated from the ſoil; and if the hay was to be made for him, it might as well be contended, that he had a right to have his corn threſhed and ground into meal. The caſe of *Fox v. Ayde*, 2 P. Wms. 522. was expreſsly in point; where it being contended that the pariſhioners *de jure* ought to make the graſs into hay, "the lord Chancellor *King* declared the law to be otherwiſe, and interrupted the counſel when they began to ſpeak to this, ſaying that all the pariſhioners were bound to do was, to cut down the graſs and divide it into ten parts, after which the parſon was to make it into hay."

HEATH, J. That caſe has been over-ruled. There is no doubt that at common law and without any cuſtom, the hay muſt be partly made before the tithe is ſet out. The pariſhioners cannot put the graſs into cocks which are to be tithed, immediately from the ſwathe. They muſt firſt *tedd* it, i. e. throw it abroad from

from the ſwathe and afterwards gather it together again. Then it being put into graſs cocks, the tithe may be ſet out; after which the parſon comes upon the ground, throws it abroad from the cock and completely makes it into hay (*a*). But it muſt firſt be *tedded* by the occupier of the ſoil.—This is not a haſty opinion. I have converſed on the ſubject with the Barons of the Exchequer and the other judges, and I take the law to be quite ſettled as I have laid it down. The plaintiff muſt be *nonſuited*.

In the enſuing term the court of K. B. granted a rule to ſhew cauſe why there ſhould not be a new trial in this caſe; but cauſe being ſhewn, they were unanimouſly of opinion that the nonſuit was right. Lord ELLENBOROUGH ſaid the tithe was to be ſet out in the firſt ſtage of the proceſs of making the graſs into *hay*, not of making it into *dung*. Generally it would be extremely injurious to the hay to be put into graſs cocks without being *tedded*. Therefore the general rule was, that *tedding* is neceſſary. If in any particular caſe, from the ſtate of the crop, this proceſs ſhould not be required, that muſt be proved by the occupier; and as no ſuch evidence had been given here, it muſt be taken that *tedding* was

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(*a*) It has been decided that the parſon has a right to make his tithe graſs into hay on the lands which produce it. Crabb v. Hayne, A. D. 1742. *Scac. Decree-book*, fo. 524.

requiſite,

requiſite, and, therefore, that the tithe had been improperly ſet out.

Rule niſi diſcharged (*a*).

Garrow and *Marryat* for the plaintiff.

Shepherd and *Beſt*, Serjeants, for the defendant.

[Attornies, *Hoſkin* and *Morgan*.]

(*a*) The eſtabliſhed rule ſeems to be that the tithe ſhall be ſevered from the other nine parts and delivered over to the parson, as ſoon as this ſeparation can take place according to the order of good huſbandry, and without prejudice to the ſubject matter to be tithed. Thus hops are titheable by the meaſure, after they are picked, and a cuſtom to ſet out the tithe of them by the tenth row or tenth hill, leaving the bends uncut and the polls ſtanding, is void. Bliſs *v.* Chandler, Gwillim, 625. Walton *v.* Tyers, ib. 841. Knight *v.* Halſey, ib. 1531. Potatoes are to be tithed immediately upon being dug, on the ſpot where they grew. Boſworth *v.* Limbrick, ib. 1110. If a few turnips are gathered at a time, the parſon ſhall have every tenth turnip; but if a whole field be gathered at one time, they muſt be ſet out in heaps and the parſon ſhall have every tenth heap. Beaumont *v.* Shilcot, ib. 944. So with regard to animals, calves are tithable when they are fit to be taken from the cow to be ſold or killed, Kenyon *v* Weſt, ib. 541; and lambs when they can live without the dam, and when the occupier weans his own lambs, and not ſooner. Croft *v.* Blake, ib. 530. *Vide* 3 Burn's Eccl. Law, 440. 1, 2.

ROGERS

ROGERS AND OTHERS *v.* ALLEN.

Wednesday, March 9.

TRESPASS for breaking and entering the ſeveral oyſter fiſhery of the plaintiffs in a certain river called Burnham river; and in divers parts of the ſaid fiſhery, to wit &c. [naming four places in Burnham river] fiſhing and dredging for oyſters, &c. A ſecond count charged the defendant with fiſhing and dredging for oyſters in divers parts of the fiſhery, between a certain place in the river called Clayclods, and a certain other place in the ſaid river called Rayſand. The laſt count was general, ſtating that the defendant broke and entered a certain other ſeveral oyſter fiſhery, and alſo a certain free fiſhery of the plaintiffs.—Pleas, 1. the general iſſue; 2.—after averring the different fiſheries mentioned in the declaration to be the ſame, that the *place in which* &c. is a navigable river, and arm of the ſea, in which all the King's ſubjects have a right to fiſh and dredge for oyſters.—The plaintiffs in their replication to the laſt plea preſcribed (*a*) under the perſons ſeized in fee of the manor of Burnham, for "the ſole, ſeveral, and excluſive liberty and privilege of fiſhing for, taking, and carrying away all oyſters and oyſter ſpats *in and upon the ſaid ſeveral parts of the ſaid fiſhery, in which, &c. in the ſaid de-*

To prove a preſcriptive right of fiſhery as appurtenant to a manor, old licences on the court rolls, granted by the lords of the manor, in conſideration of certain rents, to fiſh in the *locus in quo* are evidence, without proof of the rents being paid, if it appears that ſuch rents have been paid in modern times, or that the lords of the manor have exerciſed other acts of ownerſhip over the fiſhery.

(*a*) Mayor of Orford *v.* Richardſon, 4 T. R. 437. 2 H. Bl. 182.

claration particularly mentioned, as to the ſaid manor belonging and appertaining."—Rejoinder, traverſing this preſcription; and iſſue thereupon.

An *inquiſitio poſt mortem*, and ſeveral other documents from the Tower of London being put in, to ſhew that in very early times there had been a fiſhery at the mouth of the Burnham river held by the Fitzwalters, the anceſtors of the family now in poſſeſſion, as parcel of the manor of Burnham; and three judgments being proved, which had been obtained in the reigns of Charles I. and Charles II. by the lords of the manor of Burnham, in actions for break- and entering their ſeveral fiſhery in the Burnham river (*a*); in further ſupport of the preſcriptive right, certain licences were offered in evidence, which appeared on the court rolls of the manor, and bore date from the year 1661, downwards to the end of the 17th century; whereby the lords of the manor, in conſideration of certain rents, had granted the liberty of fiſhing and dredging for oyſters in their ſeveral fiſhery in the Burnham river, reſerving to themſelves the excluſive right to all floating fiſh therein.

The defendant's counſel objected to the admiſſibility of the licences as evidence, unleſs it ſhould appear by bailiff's accounts, or otherwiſe, that rent had actually been paid under them; urging that if they could be received without this, it would be eaſy to manufacture

(*a*) Reed *v.* Jackſon, 1 Eaſt, 355.

evidence

evidence which now, or at ſome future time, might eſtabliſh an unfounded claim, to the injury of ſome other individual, or to the excluſion of the public.

HEATH, J. ſaid, he could not diſtinguiſh theſe licences from old leaſes, which were always received in evidence, in favour of thoſe claiming under the leſſors. Nor did he think it neceſſary to prove payment under the licences, as they were of ſuch an ancient date that it could not reaſonably be ſuppoſed that evidence of ſuch payments was ſtill preſerved. However, to give any weight to theſe licences, it muſt be ſhewn that in later times payments had been made under licences of the ſame kind, or that the lords of the manor had exerciſed other acts of ownerſhip over the fiſhery, which had been acquieſced in (*a*).

After the licences, a regular ſet of leaſes, or agreements for leaſes, of the oyſter fiſhery during the whole of the laſt century were produced, and it appeared that for the laſt forty years rent had regularly been paid under them. It was likewiſe proved, that as far back as could be remembered by the oldeſt witneſſes, when ſtrangers came to dredge for oyſters within the limits of the fiſhery, they had conſtantly been driven off by a watchman kept for that purpoſe.—The plaintiff's caſe being cloſed—

(*a*) *Vide* Roe ex. d. Beebbee v. Parker, 5 T. R. 26.—Barry v. Bebbington, 4 T. R. 514. Stead v. Heaton *ib.* 669.—Outram v. Morewood, 5 T. R. 121.

A preſcriptive right to a ſeveral fiſhery in a navigable river may paſs as appurtenant to a manor.

Several grounds of defence were oppoſed to it.—In the firſt place it was ſtrenuouſly contended that a grant from the crown ought to have been produced, and that a ſeveral fiſhery in a navigable river could not paſs as appurtenant to a manor.—But

HEATH, J. ſaid, there was no authority for this ſuppoſition, and that the fiſhery might well paſs as an appurtenance of the manor(*a*).

A right of fiſhery is diviſable, and may be loſt as to part, and preſerved as to part. Therefore an excluſive right to dredge for oyſters in a navigable river may ſubſiſt as appurtenant to a manor, although it be lawful for all the King's ſubjects to catch floating fiſh therein.

The defendant afterwards gave in evidence that all who choſe had been accuſtomed to fiſh in the Burnham river for all ſorts of floating fiſh, without any interruption. It was therefore contended on his part,

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(*a*) A preſcription for *common of fiſhery* as appurtenant to certain ancient tenements is bad; ſince all the King's ſubjects of common right may fiſh in the ſea, and a man might as well preſcribe, that he and all thoſe whoſe eſtate he has, have a right to travel on the King's highway. Ward *v.* Creſwell, Willes 265, 16 Vin. Abr. tit. *Piſcary* (B). But it has been decided that there may be a preſcriptive right in a ſubject to *a ſeveral fiſhery* in an arm of the ſea. Mayor of Orford *v.* Richardſon, 4 T. R. 439. 2 H. Bl. 182. S. C. And though *primâ facie* every ſubject has a right to take fiſh found upon the ſeaſhore between high and low water mark, ſuch general right may be abridged by the exiſtence of an excluſive right in ſome individual. Bagott *v.* Orr, 2 Boſ. and Pul. 472.—As a right to a ſeveral fiſhery in an arm of the ſea is raiſed by grant, and not like the royal franchiſe of deodands and felons' goods, by matter of record, it may, according to the common rule, be preſcribed for in *a que eſtate*. Co. Litt. 114. 2 Blac. Com. 265. Indeed it cannot be expreſsly claimed under an exiſting grant from the crown; as a grant to ſupport it muſt be as old as the reign of Henry II. and therefore

part, that this completely disproved the exclusive right claimed by the lord of the manor of Burnham. A fishery must be entire; and it appeared from the licences and leases that the lords of the manor set up exactly the same pretensions to the floating fish as they did to the ground fish. Now as it had been clearly proved that it was lawful for all the King's subjects to catch the former, so might they lawfully dredge for the latter. This was like the right of free warren. If that were claimed in a particular place; and it appeared that hares and partridges (though not pheasants) had always been killed there in the same manner as over the rest of the country, it was impossible that the claim could be sustained.

HEATH, J.—A right of fishery and a right of free warren are not at all like each other. The one is divisable, the other is not. Part of a fishery may be abandoned and another part of more value may be preserved. The public may be entitled to catch floating fish in the river Burnham; but it by no means follows that they are justified in dredging for oysters, which may still remain private property.

It was next contended, that the plaintiffs must be nonsuited on account of a variance between the evidence

In trespass for breaking and entering a several fishery, if the plaintiff prescribes for the sole and exclusive right of fishing over four places in a navigable river, upon which right issue is joined, the prescription must be proved as ex-

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fore beyond time of legal memory; for by the second and third charters of Henry III. all the rivers fenced in from the beginning of the reign of Richard I. were directed to be laid open, 2 Blac. Com. 39.

tenſively as it is laid; and if the right is ſhewn to exiſt over three of theſe places, but not the fourth, this is a fatal variance, notwithſtanding that the treſpaſſes complained of were committed in a part of the river where the ſole and exclusive right of fiſhery preſcribed is proved to exiſt.

and the pleadings. It appeared that for certain oyſters layings on one of the places mentioned in the declaration the plaintiffs paid rent to the Earl of Winchelſea, and there was evidence of oyſters being taken under a claim of right from another of theſe places by the occupier of the adjoining lands. On the ſuppoſition, therefore, that the excluſive right of the lords of the manor of Burnham to the oyſters in the two places laſt alluded to was negatived, it was inſiſted that the preſcription, on which iſſue was joined, had not been made out as laid. The replication preſcribed for "the ſole and excluſive liberty and privilege of fiſhing for, taking and carrying away all oyſters in and upon the ſaid ſeveral parts of the ſaid fiſhery in the ſaid declaration particularly mentioned." But the part for which rent was paid to Lord Winchelſea and the part from which oyſters had been taken by the occupier of the adjoining ground were particularly named in the firſt count of the declaration, and were comprehended within the limits mentioned in the ſecond. As to theſe the lord of the manor had no excluſive right, and therefore the preſcription failed. The plaintiffs had preſcribed too largely; and if they were ſtill to have a verdict and judgment, the conſequence would be, that this record would afterwards be evidence of a right which had been expreſsly diſproved in the courſe of the trial.

HEATH, J. was of opinion, that although the preſcription was more extenſive than the evidence would eſtabliſh, this was immaterial, unleſs the treſpaſſes had been committed in the excepted places; and the plaintiff

tiffs had a verdict: but the court of King's Bench being afterwards moved to ſet aſide the verdict, on account of a miſdirection of the Judge upon this point, held that the preſcription laid in the replication was negatived by the evidence, and ordered a new trial (*a*).

Shepherd, *Beſt*, *Onſlow*, Serjeants, and *Trower*, for the plaintiffs.

Garrow, *Marryat*, and *Pooley*, for the defendant.

[Attornies *Taylor* and *Sutton*.]

(*a*) A party preſcribing does not fail, although the preſcriptive right is found to be *more ample* than was laid. As where the preſcription was to tether horſes in a particular place *ab et poſt feſtum Pent. annuatim*, and the verdict found that they had uſed to do ſo *in vigil. Pentecoſtes*, *in feſto Pentecoſtes*, *die Lunæ in ſeptimana Pentecoſtes*, *aut poſtea ad ſuum libitum annuatim*; this finding, though larger than the preſcription laid, was adjudged well to ſupport it. Johnſon *v.* Throughgood, Hob. 64. So where the preſcription was for common for one hundred ſheep, and found for one hundred ſheep and *ſix cows*, it was held good. Buſhwood *v.* Bond, Cro. Eliz. 722. Bul. N. P. 59. — But it is eſſentially neceſſary to prove the preſcriptive right to exiſt to the full extent in which it is claimed. In Rotheram and Green, Noy 67, which was an action of treſpaſs, the defendant juſtified under a preſcriptive right of common on 500 acres; and it being found by the verdict, that his anceſtors had releaſed the right in 5 of the acres, it was held that the defendant had failed in his preſcription. In Conyers and Jackſon, Clayt. 19, it is ſaid that a man having an acre of freehold in a field on which there is a right of common cannot preſcribe for common in the whole field, becauſe that would extend the

preſcription to his own land. Therefore where a man has land in a common field, in preſcribing for a right of common over it, he is obliged to except his own land. Sir Miles Corbett's caſe, 7 Co. 5. Hickman and Thorny, Freem. 211. - In Pring & Henley, Bul. N. P. 59, *Ward C. B.* held that if the plaintiff, in replevin for taking cattle, to an avowry for damage feaſant, preſcribe for common for all commonable cattle, evidence of a right of common for ſheep and horſes only will not maintain the iſſue; although if he had a general common, and had preſcribed for common for any particular ſort of cattle, it would have been good. And in the late caſe of Kingſmill v. Bull, 9 Eaſt, 185, it being ſtated as a cuſtom in a manor, that the lord immemorially until a diviſion of a certain tenement into moieties had a heriot, and ſince the diviſion had a heriot for each moiety; it was held that the whole being ſtated as one cuſtom, it was diſproved by ſhewing the diviſion to have taken place within time of memory.—The caſe of Griffith v. Williams, Wilſ. 338, ſeems contrary to the rule that preſcriptions are entire and can neither be ſplit by thoſe who claim them nor by the oppoſite party. There the defendant preſcribed for a duty, and right to diſtrain for it, and it was held ſufficient to traverſe either of them; *Deniſon*, J. ſaying, "Suppoſe a man claims a right to common *pur cauſe de vicinage* in A. and B. it was never doubted but that a traverſe of the right in A. would be ſufficient." However, in Morewood and Wood, 4 T. R. 157, which was treſpaſs for entering S. common, the defendant pleaded that S. common and S. green were open to each other, and preſcribed for a right in both the common and the green. The replication traverſed the right in the common only, and the rejoinder tendered iſſue on the right in the common and the green. To this rejoinder, the plaintiff demurred on the ground that the right in the green was immaterial and irrelevant; but it was held that the preſcription being intire, though it was pleaded more largely than neceſſary, the rejoinder was proper; and that as every preſcription was founded on a grant, one could not be partially traverſed any more than the other.

HORSHAM.

HORSHAM.

CORAM SIR A. M'DONALD, C. B.

BOTTING *v.* MARTIN.

Monday, March 21.

Averment in a declaration that plaintiff was poſſeſſed of premiſes *for the remainder of a certain term of years then unexpired therein*, which he agreed to aſſign to the defendant, is ſupported by evidence of a tenancy from year to year.

THIS was an action of aſſumpſit for not accepting the aſſignment of a ſhop nor taking the goods in it at a valuation.—The declaration ſtated, that the plaintiff was lawfully poſſeſſed of a certain ſhop and premiſes with the appurtenances, ſituate at Brighton, *that is to ſay, for the remainder of a certain term of years then unexpired therein*, and was alſo poſſeſſed of certain goods and chattels of a large value then being in the ſaid ſhop and premiſes; and that plaintiff being ſo poſſeſſed, defendant bargained for and agreed to take, and plaintiff agreed to aſſign to defendant the ſaid ſhop and premiſes, for the remainder of the ſaid term, and to ſell to him the ſaid goods and chattels at and for a certain reaſonable price to be therefore paid by defendant to plaintiff.

It appeared that at the time of the agreement between the parties, the plaintiff was only tenant at will or from year to year, with a promiſe of having a leaſe aſſigned to him which had fourteen years to run.

Shepherd, Serjeant, for the defendant, objected, that the plaintiff had no intereſt which under theſe circumſtances he could aſſign. He had only an equitable intereſt for the remainder of the term ſpecified in the leaſe; and even if it were ſuppoſed that he could aſſign his intereſt as tenant from year to year, that could not anſwer the deſcription in the declaration of "the remainder of a certain term of years," which evidently alluded to the written leaſe.—But

Sir A. M'Donald, C. B. held, that though it was neceſſary that the plaintiff ſhould have had ſome legal eſtate in the premiſes, which he was capable of aſſigning, his tenancy from year to year was of this nature; and that it ſufficiently correſponded with the intereſt mentioned in the declaration, which the plaintiff had agreed to aſſign (*a*).

A parol aſſignment of a leaſe from year to year, granted by parol, is void under the ſtatute of frauds, 29 Car. 2. c. 3.

Sparrow v Hawkes. Esp. N. P. C. 504, 5.

But the agreement appearing only to have been verbal,

Shepherd, Serjeant, then contended, that it was void by the ſtatute of frauds. This was not a leaſe, but an aſſignment; and though there might be a good parol demiſe for a term under three years,

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(*a*) *Item, ſi tenements ſoient leſſes a un home pur terme de demy an, ou pur le quarter de un an, &c. en tiel caſe, ſi le leſſee fait waſt, le leſſor avera envers luy brieſe de waſt, et le breiſe dirra,* quod tenet ad terminum annorum. Litt. §. 67.

yet

yet no leaſe for any period, however ſhort, or any intereſt whatever out of or to lands could be *aſſigned*, unleſs by deed or writing, ſigned by the party aſſigning, or his agent thereunto lawfully authoriſed.

Beſt, Serjeant, argued that the leaſes mentioned in the 3d ſection, as requiring to be aſſigned by writing, muſt be intended ſuch leaſes as are required by the 1ſt and 2d ſections of the ſtatute to be created by deed or writing, viz. leaſes conveying a larger intereſt to the party than for a term of three years. As a leaſe from year to year could be originally made by parol, there was no reaſon why it might not be aſſigned by parol, and the words of the ſtatute would bear this interpretation, which was clearly conſiſtent with its general import. But

Sir A. M'DONALD, C. B. held that the aſſignment was void for not being by deed or note in writing; and therefore nonſuited the plaintiff.

Beſt, Serjeant, and *Lawes*, for the plaintiff.

Shepherd, Serjeant, and *Marryat*, for the defendant.

[Attornies, *Hughes* and *Alltree*.]

MARTIN

Same day.

MARTIN AND ANOTHER *v.* GOBLE.

3 Camp. 80.

In an action for a nuisance to a dwelling-house the declaration stated, that at the time of committing the grievance plaintiff was seized in fee of the dwelling-house, and that it was then *in the possession and occupation of a certain tenant or certain tenants thereof under plaintiff.* It appeared that plaintiff was seized in fee for the use of the inhabitants of a particular parish, and that the house was occupied by the parish paupers and a person appointed by the parish officers to take charge of them. *Held* that neither the poor, nor the master of the workhouse, could be considered as *tenants* to the plaintiff, and that this was a fatal variance between the declaration and the evidence.

CASE for stopping up ancient lights, and for a nuisance in erecting a privy.

All the counts in the declaration except the 2nd averred, that before and at the time of committing the grievances therein mentioned, plaintiffs were seized in their demesne as of fee, of a certain dwelling-house, *which before and at the time of committing the said grievances was in the possession and occupation of a certain tenant or certain tenants thereof under plaintiffs;* and, after stating the grievances, concluded to the injury and prejudice of plaintiffs in their reversionary estate and interest in the same.

It appeared that the building in question which had stood between 30 and 40 years, and had been formerly used as a malt-house, was conveyed to the plaintiffs about 7 years ago, for the use of the inhabitants of the parish of Bosham, when it was converted into a parish workhouse; and that since that time it has been inhabited by the paupers belonging to the parish, and a person appointed to take care of them by the parish officers, under the name of governor of the workhouse.

Best, Serjeant, for the defendant, contended, that this evidence falsified the averment in the declaration, that

that when the grievances are ſuppoſed to have been committed, the houſe was in the poſſeſſion and occupation of *a tenant* or *tenants* under the plaintiffs. Neither the maſter of the workhouſe nor the paupers could be conſidered as tenants to the plaintiffs. They had no eſtate or intereſt in the houſe; they had no power or controul over it; they were put in and could be removed at the pleaſure of the pariſh officers, and were no more tenants of this building than a gentleman's porter is of the lodge at his maſter's gate. If they were tenants, of what ſpecies was there tenancy? All the different tenancies recognized by the law were enumerated by Lord Coke (*a*); but to none of theſe did this pretended tenancy bear the ſlighteſt reſemblance. The ſuppoſed tenants were not even occupiers of the houſe, but merely inmates; otherwiſe this abſurdity would ariſe, that pariſh paupers would be rateable to the poor in reſpect of their reſiding in the workhouſe (*b*).

Shepherd, Serjeant, *contra*, allowed that there was not a tenancy or occupation here for all purpoſes; but inſiſted that the paupers and the maſter of the workhouſe were tenants and occupiers ſufficiently to anſwer the averment in the declaration. If a man

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(*a*) Co. Litt. 1. 18. 43. 55. 188.

(*b*) Rex v. St. Bartholomew's Hoſpital, 4 Burr. 2405. Rex v. St. Luke's 2 Burr. 1053. Rex v. Fie'd, 5 T. R. 587. Rex v. Catt, 6 T. R. 332.

lent

lent his houſe to one or ſeveral of his friends, they might in a certain ſenſe be denominated tenants and occupiers of the houſe, though they might be turned out without any notice to quit.

Sir ARCHIBALD M'DONALD, C. B. ſaid, the relation of landlord and tenant certainly did not ſubſiſt between the plaintiffs and the inhabitants of this Workhouſe. The cripples in St. George's Hoſpital might as well be conſidered tenants of that building, or the ſuperior nurſe or turnkey of a mad-houſe tenants of the cells in which the lunatics are confined. As little could a mere ſervant allowed to occupy a houſe be looked upon as a tenant. In that caſe the occupation of the ſervant was the occupation of the maſter. Therefore, as this houſe was not in the poſſeſſion and occupation of any tenant or tenants thereof under the plaintiffs, the declaration, as to all except the 2d count, could not be ſupported (*a*).

If a building after having been uſed for 20 years as a malt houſe is converted into a dwelling houſe, in its new ſtate it is entitled only to the ſame degree of light which was neceſſary to it in its former ſtate, and the owner of the adjoining ground may lawfully erect a wall which pre-

The 2d count after ſtating the plaintiffs' ſeiſin in fee, without mentioning who was in poſſeſſion of the houſe, went on to allege the grievance of ſtopping up

(*a*) In an indictment for burglary, apartments in the king's palaces or in the houſes of noblemen for their ſtewards, &c. can only be laid to be the manſion houſe of the king or nobleman; and a building belonging to a public company, and occupied by their officers or ſervants, muſt be deſcribed as the manſion houſe of ſuch company, 2 Eaſt, P. C. 500.

the

the lights in the uſual form, and concluded by averring, that by means of the ſaid laſt mentioned premiſes, the plaintiffs were greatly injured and prejudiced in their *hereditary* eſtate and intereſt of and in the ſaid laſt mentioned dwelling houſe.

vents the admiſſion of ſufficient light for domeſtic purpoſes, if what is ſtill admitted would be enough for the making of malt.

The evidence as to the effect produced by a fence which the defendant had lately erected near the Workhouſe was extremely contradictory; ſome of the witneſſes ſwearing, that ſcarcely any light could be admitted through the windows; and others, that the houſe was at any rate ſtill as well ſupplied with light as it had formerly been when uſed for the purpoſe of making malt, though not perhaps ſufficiently for all domeſtic purpoſes.

Sir A. M'Donald, C. B. ſaid it was not enough that the windows were to a certain degree darkened by this wall, which the defendant had erected on his own ground. The houſe was entitled to the degree of light neceſſary for a malt houſe, not for a dwelling houſe. The converting it from the one into the other could not affect the rights of the owners of the adjoining ground. No man could by any act of his, ſuddenly impoſe a new reſtriction upon his neighbour. This houſe had for 20 years enjoyed light ſufficient for a malt houſe, and up to this extent and no farther the plaintiffs could ſtill require that light ſhould be admitted to it. The queſtion therefore was, whether, if it ſtill remained in the condition of a malt houſe, a proper degree of light for the purpoſe of making malt was now prevented

vented from entering it by reaſon of the wall which the defendant had erected (*a*).

The jury found a verdict for the defendant.

Shepherd, Serjeant, *Marryat*, and *D'Oyley*, for the plaintiffs.

Beſt, Serjeant, and *Lawes*, for the defendant.

[Attornies, *Dally* and *Gawas*.]

(*a*) *Vide* Bealey v. Shaw, 6 Eaſt, 208, from which it appears, that with reſpect to *water*, a preſumptive right is acquired by 20 years enjoyment, only to ſo much as has been appropriated during that period.

N. A new trial was afterwards granted by the court of K. B. in this cauſe; but not for a miſ-direction on either of the points above mentioned.

CROWN SIDE. COR. HEATH, J.

Same Day.

REX v. EDWARD BALL.

Upon an indictment for uttering a forged bank note, knowing it to be forged; to ſhew the priſoner's knowledge of the note mentioned in the indictment being a forgery, evidence is admiſſible of his having a ſhort time before uttered another forged bank note of the ſame manufacture, and of a number of others likewiſe of the ſame manufacture, with his hand writing on the back of them, having been in circulation.

THIS was an indictment againſt the priſoner on 45 Geo. III. c. 89, for diſpoſing of and putting away

away a forged bank note, which purported to be a promiſſory note of the Governor and Company of the Bank of England, *knowing the ſame to be forged.*

The trial came on at the Summer aſſizes at Lewes, in 1807, before HEATH, J. when clear proof was adduced, that the note in queſtion was forged, and that it had been uttered by the priſoner at Eaſt Bourn, on the 17th day of June in that year;—ſo that the only remaining queſtion was, as to his *guilty knowledge* of the forgery. To eſtabliſh this, evidence was offered and admitted, that on the 20th of March preceding, he had paſſed off a 10*l.* Bank of England note likewiſe forged, and of the ſame manufacture; and that there had been paid into the Bank of England various forged notes, dated between Dec. 1806, and March 1807, all of the ſame manufacture, and having different indorſements upon them in the hand writing of the priſoner. It likewiſe appeared that when he was apprehended he had in his poſſeſſion paper and implements fit for making notes of the ſame kind with thoſe produced.

The jury found the priſoner *guilty*; but ſentence was reſpited for the purpoſe of taking the opinion of the twelve judges as to the admiſſibility of the evidence.

The priſoner being now brought to the bar,

HEATH, J. delivered the opinion of the judges, in the following addreſs to him.

At the laſt aſſizes you were tried and convicted of uttering a forged bank note, knowing it to be forged. Evidence was given that you had uttered another note, forged in like manner with that before the jury, two months preceding the time when the note mentioned in the indictment was uttered; alſo that on ſearching the files of the Bank, a number of other notes were found to the amount of about ſixteen or twenty, forged in the ſame manner, and all indorſed with your hand writing, from whence it appeared that they had all been in your poſſeſſion. A doubt aroſe in my mind whether it was proper that this evidence ſhould be received; and I reſerved the caſe for the opinion of all the judges. After mature deliberation they are of opinion, that the evidence was admiſſible to prove your knowledge that the note was forged; and on conſideration, there can be very little doubt of the propriety of receiving it. Every thing that you ſaid or did was proper to be admitted, to ſhew your knowledge of the forgery; and the circumſtances were ſuch as to leave no doubt in the minds of the jury, that you knew the note in queſtion to have been forged.—The judge then proceeded to paſs upon him the uſual ſentence of the law.

Garrow, the *Common Serjeant*, and *Boſanquet* for the proſecution.

Gurney for the priſoner.

Vide Rex v. Wylie, 1 New. Rep. 92.

KING-

KINGSTON. COR. HEATH, J.

HARDING *v.* SPICER.

Friday, March 25.

Held, that after a plea of tender the plaintiff cannot be nonſuited.

ASSUMPSIT for work and labour.—Plea the general iſſue to all except 8*l.* 10*s.* and as to that *a tender*.—The plaintiff admitting the tender, took the money out of court, and joined iſſue on the non aſſumpſit.—It now appeared clearly, that the ſum tendered was amply ſufficient to cover the whole debt; whereupon the plaintiff's counſel propoſed to be nonſuited.

HEATH, J. After a plea of tender there cannot be a nonſuit. In a caſe on the Oxford circuit I once permitted this to be done, but the nonſuit was afterwards ſet aſide by the court.

Shepherd, Serjeant, and *Lawes*, for the plaintiff.

Beſt, Serjeant, and *Marryat*, for the defendant.

[Attornies, *Carter* and *Sermon*.]

It was formerly doubted whether there could be a nonſuit after payment of money into court; but it ſeems at laſt fully ſettled, that there may. Elliot *v.* Callow, 2 Salk. 597. Burſtal *v.* Horner, 7 T. R. 372. Jenkins *v.* Tucker, 1 H. Bl. 90.

90. Gutteridge *v.* Smith, 2 H. Bl. 374. Hithcock *v.* Tyſon, 2 Eſp. Caſ. 482 (*n*). Smith *v.* Vale, *Ib.* 607. Had it not been for the above deciſion, it might have been ſuppoſed that, upon the ſame principle, a nonſuit is not precluded by *a plea of tender*. This admits a cauſe of action to have exiſted; but, in conſideration of law, the plaintiff is nonſuited at niſi prius, not becauſe he has no cauſe of action, but becauſe he does not appear when called, to hear the verdict, and to anſwer the amerciament, to which by the old law he was liable in caſe he failed in his ſuit. 3 Bl. Com. 376. —The general rule is, that upon every continuance day, or day given over before judgment, the plaintiff may be nonſuited. Co. Litt. 139, b. Therefore at common law, if after verdict the court gave a day to be adviſed, at that day the plaintiff being demandable might have been nonſuited; and even ſince the ſtat. 2 H. 4 c. 7, he may ſtill be ſo, for the ſame reaſon, after a joinder in demurrer. *Ib.* The King cannot be nonſuited, becauſe he is ſuppoſed to be always in court. Com. Dig. tit. Pleader X. 3. And in joint actions againſt ſeveral defendants the plaintiff cannot be nonſuited as to one of them only; by reaſon of the incongruity which would thence ariſe. Weller *v.* Goyton, 1 Burr. 358. Powell *v.* White, Doug. 169. Philpot *v.* Muller. *Ib.* (*n*) — But I find no caſe eſtabliſhing any other exception to the rule, that the plaintiff may abſent himſelf when he is demandable, and that his non-appearance puts an end to the ſuit. The argument *ab inconvenienti*, that if the plaintiff could be nonſuited after a plea of tender, he might take the money tendered, and afterwards commence a freſh ſuit, applies with equal ſtrength to the effect of payment of money into court; and in either caſe, the nonſuit might be conſidered peremptory like a *retraxit*, and a bar to another action for the ſame cauſe. Rogers *v.* M'Carthy, 4 Eſp. N. P. Caſ. 106. But the error which ſuch a train of reaſoning might have occaſioned, is obviated by this determination of a moſt learned judge, who appears long to have entertained the opinion which he here acted upon; for in *Gutteridge v. Smith*, where the queſtion was as to the effect of paying money into court, he is repreſented to have ſaid, "—coming in lieu of a tender, it has all the effect which a tender would have had; *and it is clear that after a tender the plaintiff cannot be nonſuited.*" 2 H. Bl. 377.

CASES

CASES

ARGUED AND DETERMINED AT

NISI PRIUS

IN K. B.

In and after Eaſter Term,

48 GEORGE III. 1808.

FIRST SITTING IN TERM IN LONDON.

DRY *v.* BOSWELL.

Wedneſday, May 11.

ASSUMPSIT for work and labour, and materials in and about the repairs of a lighter. Plea, the general iſſue.

If there is an agreement between A. the ſole owner of a lighter, and B. a lighterman, that B. ſhall work the lighter, and that the net profits made by her ſhall be equally divided between them, A. and B. are partners in this concern, and B. as well as A. is liable for repairs done to the lighter:—But if the agreement between them is, that B. in conſideration of working the lighter ſhall have half her *groſs earnings*, this does not conſtitute a partnerſhip, being only a mode of paying B. for his labor.

There was no doubt as to the repairs being done; and the only queſtion was, whether the defendant was liable for them.

The witneſſes firſt ſtated, that the lighter was the ſole property of a perſon of the name of Ruſſell;

that ſhe was let out by him to the defendant, who worked her; and that the two ſhared her *profits* equally between them.

Lord ELLENBOROUGH ſaid, in that caſe the defendant was to be conſidered a partner, and was jointly liable for the repairs done to the lighter. There was here a participation of profit and loſs, which conſtituted a partnerſhip.

But the agreement with Ruſſell ſubſequently appeared to be this, that the defendant in conſideration of working the lighter ſhould receive half her *groſs earnings*, and that Ruſſell as owner ſhould receive the other half.

Lord ELLENBOROUGH obſerved, that this was only a mode of paying the defendant wages for his labor, and was different from a participation of profits and loſs; ſo that under theſe circumſtances no partnerſhip could be conſidered as exiſting between him and the owner of the lighter.

Evidence, however, was afterwards given of the defendant having himſelf ordered the repairs to be done, and the plaintiff had a verdict.

Garrow and *Bolland* for the plaintiff.

Park for the defendant.

v. *Small.* Exeter Spring , 1808.

on for the price of two s ſold by the plaintiff to endant. It appeared in e that the plaintiff had ed theſe bullocks, and rds put them to depaſ- pon the lands of one it being agreed that the o be made upon the re- ter they had been fatted Woof's land) above 20*l.* the plaintiff then valued hould be equally divided him and Woof.

this *Dampier* for the ıt objected, that Wiſh oof were partners and ointly to have brought on.—To this it was an- that they were merely in the profits and that this was a mode of paying Woof for the paſture.

Thompſon, B. was of the latter opinion, and the plaintiff had a verdict.

In Eaſter Term following *Dampier* moved the court of K. B. that the verdict ſhould be ſet aſide and a nonſuit entered on the foregoing ground; but a rule niſi was refuſed.

So if A. is employed by B. to ſell goods, and is to have for himſelf whatever money he can procure for them beyond a ſtated ſum, this does not conſtitute a partnerſhip between A. and B. as to theſe goods, and A. is a competent witneſs to prove the contract between B. and the perſon to whom the goods are ſold. Benjamin *v.* Porteous, 2 H. Bl. 590.

SECOND SITTINGS IN TERM AT WESTMINSTER.

Monday, May 16.

WORDALL *v.* SMITH AND ANOTHER SHERIFF OF MIDDLESEX.

An action lies against the sheriff for a false return to a writ of *fi. fa.* notwithstanding the plaintiff, before commencing the suit, having charged the defendant in the former action in execution.

THIS was an action against the Sheriff of Middlesex for a false return to a writ of *fieri facias* sued out by the plaintiff upon a judgment against one James Mason.

The writ was sued out in December, 1807, and returned *nulla bona*. In February following Mason being surrendered in discharge of his bail in another action, was charged in execution by the present plaintiff.

Park took a preliminary objection, that this action could not be supported, as the plaintiff had already obtained satisfaction (*a*). Having got the person of his debtor in custody, the debt was to be considered as extinguished. After a writ of *fi. fa.* there might be a writ of *ca. sa.* for the residue; but the creditor having

(*a*) Bird *v.* Randall, 3 Burr. 1345.

having once ſeized the body of his debtor in execution, had no other proceſs or remedy for the recovery of his debt. This was ſo ſtrong that until the act of James I. if a defendant died in execution before paying any part of the debt or damages, the judgment was conſidered as diſcharged.

Lord ELLENBOROUGH.—The plaintiff's cauſe of action accrued upon the falſe return to the writ of *fieri facias*, and cannot be defeated by any thing which has ſince taken place between him and another perſon (*a*).

On the merits, the defence was, that all Maſon's effects, conſiſting of his houſehold furniture and his ſtock in trade as a publican, before the iſſuing of the *fi. fa.* had been aſſigned to one of his creditors. A bill of ſale was accordingly given in evidence, and it was proved that a ſervant of the aſſignee was immediately put into the houſe; but it likewiſe appeared that Maſon and his wife continued to carrry on the buſineſs as uſual for ſeveral weeks after; during which time the ſervant employed to keep poſſeſſion, when he ſold beer, put the money into the till, to which they had acceſs.

An aſſignment of perſonal property is void as againſt creditors, unleſs there be a complete change of poſſeſſion; and it is not enough that a perſon is put in to keep poſſeſſion *jointly* with the aſſignor.

Lord ELLENBOROUGH. To defeat the execution by a bill of ſale, there muſt appear to have been a *bonâ fide*, ſubſtantial change of poſſeſſion. It is a

(*a*) *Vide* Richardſon *v.* Smith, *ante*, 277.

mere

mere mockery to put in another perſon to take poſſeſſion jointly with the former owners of the goods. A concurrent poſſeſſion with the aſſignor is colorable. There muſt be an excluſive poſſeſſion under the aſſignment, or it is fraudulent and void as againſt creditors.

The plaintiff had a verdict.

Garrow and *Heath* for the plaintiff.

Park and *Manley* for the defendants.

Vide 13 Eliz. c. 5. Edwards v. Harben, 2 T. R. 587. Kidd v. Rawlinſon, 2 Boſ. and Pul. 59. Holberd v. Anderſon, 5 T. R. 235. Eſtwick v. Caillaud, Id. 420. Meux v. Howell, 4 Eaſt, 1. Drury v. Baynſun, 6 Eaſt, 257.

FIRST SITTINGS AFTER TERM IN LONDON.

COTHAY AND OTHERS ASSIGNEES OF WILSON, A BANKRUPT *v.* MURRAY.

Wednesday, June 1.

9 E. R. 490.

TROVER for three boxes of indigo.

If goods are ſold to be paid by a bill at four months, and no bill is given, there is not a good petitioning creditor's debt ariſing from this ſale, to ſupport a commiſſion of bankruptcy againſt the purchaſer, till the four months have expired.

The queſtion was, whether there exiſted a good petitioning creditor's debt to ſupport the commiſſion.

It appeared that on the 10th of January Wilſon had aſſigned by deed all his ſtock in trade to a truſtee; but the only debt due from him to the petitioning creditor aroſe from the price of certain goods which he had purchaſed on the 4th of October preceding, *to be paid by a bill at four months*, no bill having been given.

Lord ELLENBOROUGH. If a bill had been given, there would have been a good petitioning creditor's debt on the 10th of January (*a*); but as the terms of the ſale

(*a*) By 5 G. 2. c. 30. §. 22. Perſons taking bills, bonds, promiſſory notes, or other perſonal ſecurity for their money, payable

sale were not complied with in that respect, there was no debt to support a commission, till the time of credit had expired.

Plaintiffs nonsuited (*a*).

Park and *Gurney* for the plaintiffs.

Garrow and *Marryat* for the defendant.

[Attornies, *Oldham* and *Nind*.]

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at a future day, are enabled to petition for, or join in petitioning for a commission, of bankruptcy:—as by 7 G. 1. c. 31, they were admitted to prove their several and respective bills, bonds, notes, or other securities, promise or agreement for the same, though payable at a future day, under the commission.

(*a*) *Vide* Parslow *v.* Dearlove, 4 East, 438. Hoskins *v.* Duperoy, 9 East, 498. Mussen *v.* Price, 4 East, 147. Dutton *v.* Solomonson, 3 Bos. & Pul. 582. Brooke *v.* White, 1 New Rep. 330.

ADJOURNED

ADJOURNED SITTINGS AT WESTMINSTER.

THE DUKE OF NORFOLK v. WORTHY.

Thurſday, June 2.

ACTION for money had and received, to recover back a depoſit upon the ſale of an eſtate. Plea, the general iſſue.

A. as the agent of B. the owner of a landed eſtate, enters into an agreement for the ſale of it with C., who appears to act on his own account, but in fact is the agent of D., and A. and C. bind themſelves in a penalty for the performance of the agreement, whereupon C. pays A. part of the purchaſe-money as a depoſit. *Held* that upon a breach of the conditions of ſale on the part of the vendor, an action for money had and received lies at the ſuit of D. againſt B. to recover back the depoſit, without proof of the money being paid over by A. to B.

The eſtate in queſtion, the property of the defendant, was advertiſed for ſale as conſiſting of 486 acres of land, ſituate between London and Brighton, *being about one mile from Horſham*, 4 from Crawley, &c. And among the conditions of ſale was the following: "If through any miſtake the premiſes ſhould be improperly deſcribed, or any error or miſ-ſtatement be inſerted in this particular, ſuch error ſhall not vitiate the ſale thereof, but the vendor or purchaſer, as the caſe may happen, ſhall pay or allow a proportionate value according to the average of the whole purchaſe money as a compenſation either way."

The ſale was to have taken place by auction on the 21ſt of December laſt; but on the 15th of the ſame month a written agreement was entered into between J. Richardſon on the behalf of the defendant, and J. Harting who then appeared as a principal, whereby the

If it is provided by conditions of ſale, that any error or miſ-ſtatement in the *particular* ſhall not vitiate the ſale, but that an allowance ſhall be made for it in the purchaſe-money, this will be extended only to any error or miſ-ſtatement inſerted thro' ignorance or inadvertency, and the ſale will ſtill be vitiated by a miſ-ſtatement introduced with a view to raiſe the apparent value of the premiſes.

Pell, Serjeant, then addreſſed himſelf to the merits of the cauſe, and inſiſted that the effect of the miſ-deſcription was ſaved by the condition, which provided that no error or miſ-ſtatement ſhould vitiate the ſale.

Lord ELLENBOROUGH ſaid, in caſes of this ſort, he ſhould always require an ample and ſubſtantial performance of the particulars of ſale, unleſs they were ſpecifically qualified. Here there was a clauſe inſerted providing that an error in the deſcription of the premiſes ſhould not vitiate the ſale, but an allowance ſhould be made for it. This he conceived was meant to guard againſt unintentional errors, not to compel the purchaſer to complete the contract if he had been deſignedly miſled. His lordſhip therefore left it to the jury, whether this was merely an erroneous miſ-ſtatement or the miſ-deſcription was wilfully introduced to make the land appear more valuable from being in the near neighbourhood of a borough-town. In the former caſe the contract remained in force; but in the latter caſe the plaintiff was to be relieved from it, and was entitled to recover back his depoſit.

The plaintiff had a verdict.

In the enſuing term *Pell*, Serjeant, moved for a new trial in this caſe, both on the ground that the action ſhould have been brought in the name of Hartring, and that it ſhould have been brought againſt

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FIRST SITTING IN TERM IN LONDON.

DRY *v.* BOSWELL.

Wedneſday, May 11.

ASSUMPSIT for work and labour, and materials in and about the repairs of a lighter. Plea, the general iſſue.

There was no doubt as to the repairs being done; and the only queſtion was, whether the defendant was liable for them.

The witneſſes firſt ſtated, that the lighter was the ſole property of a perſon of the name of Ruſſell;

If there is an agreement between A. the ſole owner of a lighter, and B. a lighterman, that B. ſhall work the lighter, and that the net profits made by her ſhall be equally divided between them, A. and B. are partners in this concern, and B. as well as A. is liable for repairs done to the lighter:—But if the agreement between them is, that B. in conſideration of working the lighter ſhall have half her *groſs earnings*, this does not conſtitute a partnerſhip, being only a mode of paying B. for his labor.

Garrow objected that the witneſs was intereſted, as he might be under covenants to the defendant to lay a certain quantity of dung on the part of the premiſes he occupied, and would at any rate be liable for not cultivating this part in a huſbandlike manner.

Lord ELLENBOROUGH held, that the objection did not go to the competency of the witneſs, however it might affect his credit.

The defendant had a verdict.

Garrow and *Roberts* for the plaintiff.

Park and *Curwood* for the defendant.

[Attornies, *Whiſtaw* and *Neald.*]

Vide Peak. Law Ev. 2d ed 144.

FAREBROTHER

FAREBROTHER *v.* ANSLEY AND ANOTHER, LATE SHERIFF OF MIDDLESEX.

Same Day.

There is no implied promiſe on the part of a Sheriff to indemnify an auctioneer who ſells goods ſeized under a *fi. fa.* when employed to do ſo by the Sheriff's officer to whom the warrant was directed, and the plaintiff's attorney in the original cauſe, although the Sheriff certified to the exciſe office that he himſelf had ſeized and *ſold the goods*, and he in fact received his poundage from the produce of the ſale. And if an action of treſpaſs is brought by the owner of the goods againſt the auctioneer, the ſheriff and others, all the damages awarded in which are levied upon the auctioneer alone, he has no action for a contribution againſt any of his co-defendants.

THIS was an action of aſſumpſit on a promiſe to indemnify the plaintiff in the ſale of certain goods taken in execution by the defendants.

The declaration, after ſtating a writ of *fieri facias* to have been ſued out by C. Tomkins, requiring the Sheriff of Middleſex to levy 363*l.* 16*s.* beſides poundage on the goods of J. P. Auberey; that a warrant was made by the defendant as ſuch Sheriff to T. Watkins to levy under the writ, and that Watkins had ſeized and taken certain goods and chattels as and for the goods and chattels of the ſaid J. P. Auberey, alleged that in conſideration that the plaintiff at the ſpecial inſtance and requeſt of the defendants would, in the way of his profeſſion and buſineſs of an auctioneer, ſell and diſpoſe of the ſaid goods and chattels ſo ſeized and taken in execution as aforeſaid, the defendants undertook to ſave him harmleſs and keep him indemnified from and againſt all damages, coſts, charges, and expences which he might ſuſtain or be put unto for and on account of his ſo ſelling and diſpoſing of the ſaid goods and chattels. The declaration then averred that the plaintiff did ſell and diſpoſe of the goods, and after aſſigning a breach in the common form for not

Q. Whether if the ſheriff had himſelf actually employed and directed the auctioneer to ſell the goods, there would have been an implied promiſe of indemnity?

indemnifying, ſtated that an action of treſpaſs was brought jointly againſt him, the defendants, and T. Watkins by J. Bland, who claimed to be the real owner of the goods, in which action Bland recovered a verdict for 395*l.* 5*s.* 6*d.*, and that the whole of this ſum, together with the Sheriff's poundage, &c. was levied upon the goods of the plaintiff. There were ſeveral other ſpecial counts in the declaration, laying the promiſe of indemnity different ways; and the uſual money counts.—Plea, *the general iſſue.*

In this caſe all the judicial proceedings ſet forth in the declaration were admitted on the part of the defendants, and it was not contended on the part of the plaintiff, that there had been any *expreſs* promiſe by the defendants or their agents to indemnify him. The only queſtion, therefore, was, whether, under the circumſtances, the defendants were liable upon an *implied* promiſe to make good to the plaintiff the damages which had been levied upon him at the ſuit of Bland, or any proportionate part thereof.

The plaintiff was employed as auctioneer or broker on this occaſion, not by the ſheriff, but by the attorney who ſued out the *fi. fa.* in the cauſe of *Tomkins* v. *Auberey*, and the ſheriff's officer to whom the warrant under it had been directed.

To prove that the defendants had actually ſold the goods by the plaintiff as their agent, the principal evidence was a catalogue of the goods returned by the

plaintiff

plaintiff to the auction department in the excise office, with the following certificate indorsed upon it—

"I certify that the goods and chattels mentioned in this catalogue were seized by me as the property of J. P. Auberey, by virtue of His Majesty's writ of *fieri facias*, at the suit of C. Tomkins, to levy 363*l.* 16*s.* besides &c.; and that I have sold the same for 264*l.* 13*s.* Dated the 24th day of January, 1806.

(L. S.) JOHN ANSLEY, THOS. SMITH, } Sheriff."

It likewise appeared that out of this money the defendants had received 14*l.* for their poundage, and that they had taken a bond of indemnity from Tomkin's attorney and another person before the sale of the goods.

Lord ELLENBOROUGH, soon after the plaintiff's case was opened, expressed great doubts whether the the action could be supported; as according to the case of Merryweather *v.* Nixan (*a*), there was no contribution among joint wrong doers, where there was a judgment against them jointly, and all the damages were levied against one of them; nor even supposing that the plaintiff had been employed by the defendants, did it follow that they were bound to indemnify him; since a promise of indemnity was not to be implied if

(*a*) 8 T. R. 186.

one man committed a treſpaſs at the requeſt of another.

Park and *Marryat* maintained, that though perhaps the plaintiff could not recover as for a contribution under the count for money paid, the law certainly raiſed a promiſe on the part of the defendants to indemnify him againſt the conſequences of what he had done as their agent. If the ſeizure and ſale of the goods had been known at the time to be a treſpaſs, the matter would have been otherwiſe, and even an expreſs promiſe to indemnify would have been illegal and void. But the diſtinction here was, that when the plaintiff was employed as auctioneer to ſell the goods they were believed by both parties to be the property of Auberey, and it was conſidered to be the duty of the ſheriff to levy the money upon them in obedience to the King's writ. Therefore there was nothing illegal in the defendants retaining the plaintiff as an auctioneer to ſell the goods;—the conſequence of which was an implied promiſe on their part to ſave him harmleſs againſt the conſequences of any thing he did in the courſe of that employment. The practice of the ſheriff in caſes of this kind taking bonds of indemnity (the validity of which had never been queſtioned) marked the difference between acts which might eventually turn out to be treſpaſſes, and acts which were perceived to be ſuch before they were committed.

The trial was allowed to proceed; but no evidence being given of the defendants having employed the plaintiff to ſell the goods,——

Lord

Lord ELLENBOROUGH, when he came to ſum up, obſerved, that the action now appeared to be brought by the plaintiff to be indemnified againſt the conſequences of his own blunder. The ſheriff muſt anſwer as the *ſuperior* to the party who ſues, and to the party whoſe goods are taken. But the difference is every thing between the relation in which he ſtands to ſtrangers, and the relation which ſubſiſts between him and his own inſtruments of office. They ſay he is liable to them for the conſequences of their acts. No; they are liable to him. This is a complete inverſion of liability. The certificate produced only ſhews that the ſheriff adopted the ſale by the auctioneer as to the public, not that he made himſelf reſponſible for the acts of the individuals concerned *inter ſe*. The bond of indemnity taken by the ſheriff was likewiſe quite collateral; and after he took it he had not a whit leſs of claim againſt thoſe who had involved him in the treſpaſs. If the damages recovered by Bland had been levied upon the ſheriff inſtead of Farebrother, I want to know why he might not have ſued his bound bailiff by whom the goods of Bland had been tortiouſly ſeized? If I order my ſervant to turn out a horſe treſpaſſing on my field, and he turns out horſes agiſting there, I may be liable to others for the conſequences, but not to him. This likewiſe is a queſtion between maſter and man.—Neither an expreſs nor implied promiſe of indemnity appears to ſupport the plaintiff's demand.

Verdict for the defendants.

Park and *Marryat* for the plaintiff.

Garrow and *Reader* for the defendants,

[Attornies, *Maddock* and *Smith*.]

Where a perſon has been induced *ignorantly* to commit an illegal act, an expreſs promiſe of indemnity has been held to be valid. Fletcher *v.* Harcott, Hutt. 55. But an expreſs promiſe to indemnify a perſon againſt that which from the nature of his office he muſt be taken to have been conſcious was againſt law, is void. Martyn *v.* Blithman, Yelv. 197. I have not been able to find any caſe deciding how far a promiſe of indemnity will be *implied*, where one ignorantly commits a treſpaſs at the requeſt of another.

Friday, June 3.

BOWRY *v.* BENNET, SPINSTER,

If articles of dreſs are ſold to a woman of the town, an action will lie to recover their value, although the ſeller knew the way of life of the purchaſer; unleſs he furniſhed them with a view to enable her to carry it on, and he expected to be paid from the profits of her proſtitution.

ASSUMPSIT to recover the value of certain clothes furniſhed by the plaintiff to the defendant.—Plea, *the general iſſue*.

The defence ſet up was, that the defendant was a woman of the town; that this was well known to the plaintiff, and that the clothes in queſtion were for the purpoſe of enabling the defendant to carry on her buſineſs of proſtitution.

The evidence to bring home a knowledge of the defendant's

defendant's way of life to the plaintiff, was very slight; and

Lord ELLENBOROUGH said, it must not only be shewn that he had notice of this, but that he expected to be paid from the profits of the defendant's prostitution, and that he sold the clothes to enable her to carry it on, so that he might appear to have done something in furtherance of it. In that case the contract was corrupt and illegal, and such as could not be enforced in a court of justice; but it was not to be considered of this description from the mere circumstance of the defendant being a prostitute, even within the plaintiff's knowledge.

The plaintiff had a verdict.

Garrow and ——— for the plaintiff.

Park for the defendant.

[Attornies, *Stephenson* and *Sheppard*.]

So it is no bar to an action for the use and occupation of a lodging, that the defendant was an infant and a prostitute; "as both an infant and a prostitute must have a lodging." Crisp v. Churchill, 1 Bos. & Pul. 340. And an action may be maintained against a female of this description for the amount of a washerwoman's bill, although it should appear that the articles washed consisted principally of expensive dresses and gentl. men's night caps. *Per* BULLER, J. "This unfortunate woman must have clean linen; and it is impossible for the court to take into consideration which of these articles were used by the defendant

ant to an improper purpoſe, and which were not." Lloyd *v.* Johnſon, 1 Boſ. & Pul. 341. But wherever any thing is done directly in furtherance of immorality, the maxim *ex turpi cauſâ non oritur actio* applies. Thus, if a lodging is knowingly let for the purpoſes of proſtitution, an action will not lie for the uſe of it. Girardy *v.* Richardſon, 1 Eſp. Caſ. 13. So in an action for board and lodging, where it appeared that the plaintiff kept a houſe of bad fame, and beſides what ſhe received for the board and lodging of the unfortunate women who lived with her, partook of the profits of their proſtitution, Lord Kenyon declared, that ſuch a demand could not be heard in a court of juſtice. Howard *v.* Hodges, Selw. N. P. 60.

TABART *v.* TIPPER.

Saturday, June 4.

In an action for a libel upon the plaintiff in his buſineſs of a bookſeller, accuſing him of being in the habit of publiſhing immoral and fooliſh books, the defendant, under the plea of *not guilty*, may adduce evidence to ſhew, that the ſuppoſed libel is a fair ſtricture upon the general run of the plaintiff's publications.

THIS was an action for a libel on the plaintiff, contained in a periodical work called "The Satiriſt or Monthly Meteor," publiſhed by the defendant. —The declaration, after ſtating that the plaintiff was a publiſher and vendor of books for children, and always publiſhed and vended books of an uſeful, moral and proper tendency and deſcription for their uſe, alleged that the defendant contriving and maliciouſly intending to injure the plaintiff in his good name and character, and to cauſe it to be ſuſpected and believed, that he publiſhed and vended books of an abſurd, immoral, and improper tendency and deſcription for children, compoſed and printed the libel in queſtion.—Plea, *the general iſſue.*

Garrow, in croſs examining one of the plaintiff's witneſſes, aſked him whether the plaintiff had not publiſhed ſuch and ſuch books; with a view to ſhew, that the ſuppoſed libel was a fair ſtricture upon the common run of the plaintiff's publications.

Topping objected to this evidence as inadmiſſible under the general iſſue of *not guilty*.

Garrow maintained, that the evidence was clearly receivable, as it went to negative the malice imputed to the defendant; and cited Anthony Paſquin's caſe as in point, where in an action for a libel upon an author, Lord Kenyon admitted evidence of the nature of the plaintiff's works, and it appearing that they were themſelves of a libellous and ſcandalous deſcription, his Lordſhip threw his parchment at his head, and diſmiſſed him from the court with infamy.

Lord ELLENBOROUGH. The main queſtion here is, *quo animo* the defendant publiſhed the article complained of;—whether he meant to put down a nuiſance to public morals, or to prejudice the plaintiff? To aſcertain this, it is material to know the general nature of the plaintiff's publications to which the libel alludes; and I therefore think that the evidence is receivable. The plaintiff is bound to ſhew that the defendant was actuated by malice, and the defendant diſcharges himſelf by proving the contrary. Liberty of criticiſm muſt be allowed, or we ſhould neither have purity of taſte nor of morals. Fair diſcuſſion

cuſſion is eſſentially neceſſary to the truth of hiſtory and the advancement of ſcience. That publication therefore I ſhall never conſider as a libel, which has for its object, not to injure the reputation of any individual, but to correct miſrepreſentations of fact, to refute ſophiſtical reaſoning, to expoſe a vicious taſte in literature, or to cenſure what is hoſtile to morality.

The croſs examination accordingly proceeded.

In an action for a libel, if ſeparate paſſages of the libel are to be ſet out in one count of the declaration, they ought to be deſcribed as ſeparate and diſtinct from each other.

When the libels came to be read, an objection was taken to the firſt count for *a variance*. It was averred in this count, that the defendant compoſed and printed a libel, "containing therein, the falſe, ſcandalous, malicious and defamatory words and matter following of and concerning the ſaid plaintiff in his aforeſaid trade and buſineſs, that is to ſay, &c." The libel was then ſet out, which, after ſome ſentences containing a mock panegyrick upon a poem ſuppoſed to have been lately publiſhed by the plaintiff, appeared on the record with proper innuendos as follows. "Not to tire your numerous readers with needleſs prolixity, I proceed to the magnificent

"POEM.

"There was a little maid
"And ſhe was afraid,
"Her ſweet heart would come to her,
"She bound up her head
"When ſhe went to bed,
"And ſhe faſtened her door with a ſkewer.

"*But*,

" *But, ſir, a truce to triſling*, &c."

In the book itſelf, immediately after the doggerel verſes, there were theſe Latin words, which were omitted by the pleader in drawing the declaration:

Dixin' ego vobis Atticam quandam ineſſe elegantiam?

Lord ELLENBOROUGH ſaid, the libel was here ſet out as if it were an entire and continuous part of the book from which it was taken. But in fact it conſiſted of two ſeparate and divided parts of the book. The declaration propoſed to do one thing and did another. The more correct way would have been to have ſaid; " *in a certain part of which ſaid libel, there was and is contained &c., and in a certain other part of which ſaid libel, there was and is contained &c.*" However, in this inſtance the ſenſe was not altered by the paſſage omitted; if it had, he ſhould have directed a nonſuit.

The 3d count, framed like the firſt, was for a libel contained in another number of " *The Satiriſt*," profeſſing to offer certain ſtrictures upon the article above mentioned, and ſet out the following ſentence: " My ſarcaſtic friend, by leaving out the repetition or chorus of MONS. T's. poem, greatly injures the *tout enſemble*, or general and combined effect." In the book itſelf it ran, " *My ſarcaſtic friend* ΜΩΡΟΣ, *by leaving out &c.*"

It being objected that the omiſſion of the name of the perſon alluded to, materially altered the meaning of the ſentence,——

Lord ELLENBOROUGH declared himſelf of the ſame opinion, and held that the plaintiff was not entitled to a verdict upon the 3d count.

Although it is lawful for an author to animadvert upon the conduct of a bookſeller in publiſhing books of an improper tendency, it is actionable falſely to impute to him the publication of any immoral or abſurd literary production.

On the part of the defendant it was allowed, that the plaintiff had not publiſhed the poem imputed to him; but it was urged that this was intended as a juſt ſpecimen of his publications.

Lord ELLENBOROUGH however informed the jury, that it was certainly actionable gravely to impute to a bookſeller having publiſhed a poem of this ſort, to which he was a ſtranger; as the evident tendency of the unfounded imputation was to hurt him in his buſineſs.

The plaintiff had a verdict with *one ſhilling* damages.

Topping and *Reader*, for the plaintiff.

Garrow, for the defendant.

[Attornies, *Moore* and *Stokes*.]

In a caſe decided at the ſittings after Trinity term, but which, from its being intimately connected with *Tabbart* v. *Tipper*, it may be convenient to introduce here, Lord ELLENBOROUGH

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and of and concerning the ſaid books, of which the ſaid Sir John was the author as aforeſaid, which ſame libel was entitled "*My Pocket Book, or Hints for a Ryghte Merrie and conceited Tour, in quarto, to be called* THE STRANGER IN IRELAND IN 1805, (thereby alluding to the ſaid book of the ſaid Sir John, thirdly above mentioned,) by a knight errant (thereby alluding to the ſaid Sir John)," and which ſame libel contained therein a certain falſe, ſcandalous, malicious, and defamatory print, of and concerning the ſaid Sir John, and of and concerning the ſaid books of the ſaid Sir John, 1ſt and 2dly above mentioned, therein called, "*Frontiſpiece*," and entitled "*The Knight* (meaning the ſaid Sir John) *leaving Ireland with Regret*," and containing and repreſenting in the ſaid print, a certain falſe, ſcandalous, and malicious, defamatory, and ridiculous repreſentation of the ſaid Sir John, in the form of a man of ludicrous and ridiculous appearance, holding a pocket handkerchief to his face, and appearing to be weeping, and alſo containing therein, a certain falſe, malicious, and ridiculous repreſentation of a man of ludicrous and ridiculous appearance, following the ſaid repreſentation of the ſaid Sir John, and repreſenting a

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man loaded with, and bending under the weight of three large books, one of them having the word "*Baltic*," printed on the back thereof, &c. and a pocket handkerchief appearing to be held in one of the hands of the ſaid repreſentation of a man, and the corners thereof appearing to be held or tied together, as if containing ſomething therein, with the printed word "*Wardrobe*" depending therefrom, (thereby falſely, ſcandalouſly, and maliciouſly, meaning and intending to repreſent, for the purpoſe of rendering the ſaid Sir John ridiculous, and expoſing him to laughter, ridicule, and contempt, that one copy of the ſaid 1ſt mentioned book of the ſaid Sir John, and two copies of the ſaid book of the ſaid Sir John 2dly above mentioned, were ſo heavy as to cauſe a man to bend under the weight thereof, and that his the ſaid Sir John's wardrobe was very ſmall, and capable of being contained in a pocket handkerchief,) and which ſaid libel alſo contained, &c. &c. The declaration concluded by laying as ſpecial damage, that the ſaid Sir John had been prevented and hindered from ſelling to Sir Richard Philips Knt. for a large ſum of money to wit 600*l.*, the copyright of a certain book or work of him the ſaid Sir John, of which the ſaid Sir John was the author, containing an account of a tour of him the ſaid Sir John through part of Scotland, which but for the publiſhing of the ſaid falſe, ſcandalous, malicious, and defamatory libels, he the ſaid Sir John would, could, and might have ſold to the ſaid Sir Richard Philips for the ſaid laſt mentioned ſum of money, and the ſame remained wholly unſold and undiſpoſed of, and was greatly depreciated and leſſened in value to the ſaid Sir John.—Plea; *not guilty*.

Lord ELLENBOROUGH, as the trial was proceeding, intimated an opinion, that if the book publiſhed by the defendants only ridiculed the plaintiff as an author, the action could not be maintained.

Garrow for the plaintiff allowed, that when his client came forward as an author, he ſubjected himſelf to the criticiſm of all who might be diſpoſed to diſcuſs the merits of his works; but that criticiſm muſt be fair and liberal; its object ought to be to enlighten the public, and to guard them againſt the ſuppoſed bad tendency of a particular publication preſented to them, not to wound the feelings and to ruin the proſpects of an individual. If ridicule was employed, it ſhould have ſome bounds. While a liberty

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tack on the moral character of this plaintiff, or any attack upon his character unconnected with his authorſhip, and I ſhall be as ready as any judge who ever ſate here to protect him; but I cannot hear of malice on account of turning his works into ridicule.

The Counſel for the plaintiff ſtill complaining of the unfairneſs of this publication, and particularly of the print affixed to it, the trial proceeded.

The *Attorney General* having addreſſed the jury on behalf of the defendants—

Lord ELLENBOROUGH ſaid, Every man who publiſhes a book commits himſelf to the judgment of the public, and any one may comment upon his performance. If the commentator does not ſtep aſide from the work, or introduce fiction for the purpoſe of condemnation, he exerciſes a fair and legitimate right. In the preſent caſe, had the party writing the criticiſm followed the plaintiff into domeſtic life for the purpoſes of ſlander, that would have been libellous; but no paſſage of this ſort has been produced, and even the caricature does not affect the plaintiff, except as the author of the book which is ridiculed. The works of this gentleman may be, for aught I know, very valuable; but whatever their merits, others have a right to paſs their judgment upon them;—to cenſure them if they be cenſurable, and to turn them into ridicule if they be ridiculous. The critic does a great ſervice to the public, who writes down any vapid or uſeleſs publication, ſuch as ought never to have appeared. He checks the diſſemination of bad taſte, and prevents people from waſting both their time and money upon traſh.—I ſpeak of fair and candid criticiſm; and this every one has a right to publiſh, although the author may ſuffer a loſs from it. Such a loſs the law does not conſider as an injury; becauſe it is a loſs which the party ought to ſuſtain. It is in ſhort the loſs of fame and profits to which he was never entitled. Nothing can be conceived more threatening to the liberty of the preſs than the ſpecies of action before the court. We ought to reſiſt an attempt againſt free and liberal criticiſm at the threſhold.—The CHIEF JUSTICE concluded by directing the jury, that if the writer of the publication complained of had not travelled out of the work he criticiſed for the purpoſe of ſlander, the action would not lie; but if they could diſcover in it any thing perſonally ſlanderous againſt the plaintiff, unconnected with the works he had given to the public, in that caſe he had a good cauſe of action,

tion, and they would award him damages accordingly.

Verdict for the defendants.

So, though it is an aggravated miſdemeanor to publiſh an invective againſt judges and juries with a view to bring into ſuſpicion and contempt the adminiſtration of juſtice in the country, ſtill it is lawful with candour and decency to diſcuſs the merits of the verdict of a jury or the deciſions of a judge.

Rex v. *White* and *another*. London Sittings, after E. T. 48 Geo. III. *Cor.* GROSE, J.

This was an information filed by the Attorney General againſt the proprietor and printer of a Sunday newſpaper, called *The Independent Whig*, for a libel upon Mr. JUSTICE LE BLANC and the jury before whom the captain of a merchant ſhip had been tried for murder, at the Old Bailey.

The libel affirmed the priſoner to have been guilty of murdering one of his crew, and in a groſs and abuſive ſtyle cenſured the judge and jury for acquitting him.

It was contended, on the part of the defendants, that every one has a right to canvaſs the proceedings of courts of juſtice, and that the article complained of was a fair exerciſe of that right.

GROSE, J. ſaid, it certainly was lawful with decency and candour to diſcuſs the propriety of the verdict of a jury or the deciſions of a judge, and if the defendants ſhould be thought to have done no more in this inſtance, they would be entitled to an acquittal; but on the contrary, they had tranſgreſſed the law, and ought to be convicted, if the extracts from the newſpaper ſet out in the information contained no reaſoning or diſcuſſion, but only declamation and invective, and were written not with a view to elucidate the truth, but to injure the characters of individuals, and to bring into hatred and contempt the adminiſtration of juſtice in the country.

The defendants were found guilty on this and a ſimilar information, and ſentenced to three years impriſonment.

Vide M'Dougal v. Claridge, *ante* 267, and the caſes there referred to.

Wednesday June 8.

BURCHELL *v.* HORNSBY.

An action on the case in the nature of waste lies at the suit of a landlord against his tenant for acts done by the latter while holding over after the expiration of a notice to quit.

THIS was an action on the case in the nature of waste, for an injury to plaintiff in his reversionary estate and interest in a house and garden at Parson's Green. The declaration stated, that while the defendant possessed the premises as tenant to the plaintiff, and while the reversion thereof belonged to the plaintiff, the defendant did the several acts complained of.

It appeared in evidence that the defendant holding as tenant from year to year, had at Michaelmas 1807, received a notice to quit at the following Lady-day, and that several of the acts of waste described in the declaration had been committed after the 25th of March 1808.

Park contended that for these the plaintiff's remedy was trespass and not case. The tenancy determined when the notice to quit expired, and the relation of landlord and tenant then ceased to exist between the parties. After that period it was impossible that the plaintiff should be injured in his reversionary estate and interest; for there being no term or particular estate subsisting, there could be no reversion.

Lord ELLENBOROUGH.—While the possession remained in the tenant, the landlord may be considered as entitled to the reversion; and although the landlord might have treated the tenant holding over after the

expiration of a regular notice to quit as a treſpaſſer, it does not follow that he might not waive the treſpaſs and bring the preſent action.

The cauſe was afterwards referred.

Garrow and *Comyn* for the plaintiff.

Park and *Jervis* for the defendant.

Vide Cobb v. Stokes, 8 Eaſt, 358.—Wright v. Smith, 5 Eſp. Caſ. 203.—Soulſby v. Nering, 9 Eaſt, 310.

SYMONDS *v.* CARR. Same day.

ASSUMPSIT on the warranty of a horſe. The declaration was in the common form.—Plea, the general iſſue.

The witneſs to prove the contract, ſtated that he was an agent for the ſale of horſes; that he ſold this horſe of the defendant, and another belonging to a third perſon, to the plaintiff at the ſame time, at an entire price of 90 guineas, and that he warranted both to be ſound.

If an agent for the ſale of horſes ſells to A., in one lot and at an entire price, a horſe belonging to B. and another belonging to C. waranting both horſes to be ſound; A. cannot maintain aſſumpſit againſt B. for the unſoundneſs of the horſe which belonged to the latter, declaring as upon a ſale of one horſe; ſince the contract concerning the two horſes was e tire.

Lord ELLENBOROUGH.—The evidence does not ſupport the declaration.

Maryatt, for the plaintiff, urged that this was the only way in which the plaintiff could have declared in the preſent action, as he had not bought the ſecond horſe of the defendant; and that it would be hard to put the plaintiff to bring his action againſt the agent, who might not be a reſponſible perſon.

Lord ELLENBOROUGH.—That cannot be helped. The contract was entire, and if the other horſe had proved unſound, that would have been a breach of the contract; but there is no pretence for ſaying that the defendant would have been liable for that breach.

Plaintiff nonſuited (*a*).

Maryatt for the plaintiff.

Garrow for the defendant.

(*a*) In this caſe the purchaſe of the two horſes by the plaintiff clearly conſtituted the conſideration for the warranty; and in declaring upon a contract not under ſeal, it is always neceſſary to ſtate ſo much of it as contains the entire conſideration, and the entire act or duty to be done in virtue of ſuch conſideration, the breach of which act or duty is complained of. Clark v. Grey, 6 Eaſt, 564.—Hands v. Burton, 9 Eaſt, 349.

GOWLAND v. WARREN.

Same day.

ASSUMPSIT for uſe and occupation, money paid &c.—Plea, *the general iſſue.*

The defendant cannot give his bankruptcy in evidence under the general iſſue.

12 East. 667.
4 T. R. 157.

The plaintiff's caſe being made out,—

Taddy propoſed to give in evidence the certificate obtained by the defendant under a commiſſion of bankrupt iſſued againſt him ſince the cauſe of action accrued. He contended that although it was uſual to plead bankruptcy, it never had been decided that this was neceſſary, and that the words of the ſtatute which allow bankruptcy to be pleaded in a particular form do not prevent the defendant from giving the ſpecial matter in evidence under the general iſſue of non aſſumpſit.

Lord ELLENBOROUGH.—This courſe has never before been attempted, and I ſhould be extremely ſorry to ſanction it. No one could go to trial with ſafety, if a bankruptcy could be thus ſuddenly ſtarted upon him. The nature of the defence, however, ſeems to me deciſive againſt permitting it to be taken advantage of under the general iſſue. Bankruptcy in the defendant does not ſhew that the plaintiff never had any cauſe of action, or that his demand has been cut down. The debt ſtill exiſts, and the certificate only operates as a ſpecial diſcharge from it under the ſtatute.

The party, therefore, can avail himſelf of this diſcharge only in ſuch manner as the ſtatute has provided.

Verdict for the plaintiff.

Garrow and *Lawes* for the plaintiff.

Taddy for the defendant.

[Attornies, *Wild* and *Palmer & Co.*]

Vide 5 G. 2. c. 30. § 7. Harris v. James, 9 Eaſt, 83.

Thurſday, June 9.

WILLIAMS, SPINSTER, *v.* INNES AND OTHERS, EXECUTORS, &c.

If A. refers B. for information upon any particular ſubject to C., what C. ſays concerning it, when applied to by B. or his agent, is evidence for B. in an action againſt A

COVENANT on an indenture, whereby the defendants' teſtator covenanted to marry the plaintiff within a certain time, or to pay her annuity. The defendants *(inter alia)* pleaded that they had fully adminiſtered.

To prove aſſets in their hands, an account rendered by them to the plaintiff was given in evidence, in which they ſtated that 1000*l.* had been awarded as due to the teſtator's eſtate from a perſon who had been jointly

jointly concerned with him in underwriting policies of insurance.

Lord ELLENBOROUGH held this not to be sufficient proof of assets, as it did not shew that any part of the sum awarded had been received by the executors.

A letter from the defendants to the plaintiff was then put in, stating to her, that if she wanted any farther information concerning the affairs of the deceased, she should apply to a Mr. Ross, a merchant in the city.

It was next proposed to adduce the plaintiff's attorney to prove that by her desire he had called upon Mr. Ross, who informed him that the whole of the 1000*l.* had actually been received by the defendants.

Scarlett objected to the admissibility of this evidence as not being the best which the nature of the case admitted of, and contended that Ross himself should be called, who would then state upon his oath what he knew concerning this matter, and might be cross-examined as to the means of knowledge which he possessed. But—

Per Lord ELLENBOROUGH. — If a man refers another upon any particular business to a third person, he is bound by what this third person says or does concerning it, as much as if that had been said or done by himself. This was agreed to be law by all the Judges on the trial of Mr. Hastings.

Upon

Upon the recommendation of the Chief Juſtice, the cauſe was afterwards compromiſed.

Garrow and *Holroyd* for the plaintiff.

Scarlett and *Campbell* for the defendants.

[Attornies, *Blunt* and *Oakley*.]

Daniel v. *Pitt*, K. B. Mx. Sittings after M. T. 1806.

Plaintiff brought his action againſt defendant for goods ſold and delivered; and the defence was, that the goods in queſtion never were delivered to the defendant. Plaintiff aſſerted that they had been delivered by a car-man of the name of Coomes. Defendant in a converſation with plaintiff ſaid, "if Coomes will ſay that he did deliver the goods, I will pay for them." Upon the trial plaintiff called a witneſs to prove that Coomes (who was ſince dead) had been applied to in conſequence of defendant's referring to him, and that Coomes had ſaid, he did deliver the goods in queſtion.—*Maryat* for the defendant objected to this evidence of what Coomes ſaid; but

Lord ELLENBOROUGH, C.J. ſaid, wherever a party refers to the evidence of another, he is bound by it—and this is conſtantly good evidence.

Brock v. *Kent*, widow, K. B. Sittings in London after M. T. 47 Geo. III.

Action for work and labour &c.—One item of the demand was for 2*l.* which had been inſerted in a former bill paid by defendant; but in paying which, as plaintiff alleged, ſhe had given him a forged 2*l.* Bank of England note. The inſpector of notes proved that he carried back the note to defendant, who ſaid if ſhe paid it away, ſhe had it from one *Jones*; and deſired him to enquire of Jones about it. Witneſs then proceeded to ſtate what Jones had told him;—and this evidence was allowed, as defendant had referred to Jones for information upon this ſubject.

Vide Emerſon v. Blonden, 1 Eſp. Caſ. 142.—Burt v. Palmer, 5 Eſp. Caſ. 145.

DOE *ex d.* BAGGALLEY *v.* JONES.

Same day.

EJECTMENT to recover a piece of garden ground ſituate at Highgate.

A memorandum ſigned by a perſon deceaſed, who had been owner of a copyhold tenement, and had occupied a ſl p of garden ground adjoining, ſtating that no part of the garden ground belonged to the copyhold, but that he paid rent for the whole of it, is admiſſible evidence for the leſſor of the plaintiff in an ejectment for this garden ground, to ſhew that it is not a part of the copyhold tenement.

The queſtion was, whether the ground in diſpute was parcel of certain freehold property held by the leſſor of the plaintiff under the biſhop of London, or of a copyhold tenement lately purchaſed by the defendant within the manor of Hornſey.

For a conſiderable number of years this garden ground had been occupied by the owner of the copyhold; but to ſhew that in reality the former was not a part of the latter, there was produced a paper ſigned by a perſon deceaſed of the name of Byron, proved to have been owner of the copyhold, and in the occupation of both between 40 and 50 years ago, in which he ſtates that no part of the garden ground was copyhold, but that he paid 20*s.* rent for one part of it, and 1*l.* 11*s.* 6*d.* for the reſidue.

Topping objected, that this memorandum was not evidence againſt the defendant. But

Lord ELLENBOROUGH held, that it was receivable to prove that the garden ground therein mentioned was not copyhold; as Byron's intereſt lay the other way, and he charged himſelf by this repreſentation with the payment of rent to which he would not

have been liable had the garden ground been parcel of his own tenement.

The leſſor of the plaintiff had a verdict.

Garrow, *Marryat*, and *Lawes*, for the leſſor of the plaintiff,

Topping and *Reader*, for the defendant.

So entries by a ſteward ſince deceaſed, charging himſelf with the receipt of money from different perſons, in ſatisfaction of treſpaſſes committed on the waſte, are admiſſible evidence to prove the right to the ſoil. Barry *v.* Bebbington, 4 T. R. 514. But entries by a third perſon deceaſed, of receipts of rent from his tenant for a particular piece of ground are not evidence to prove that the ground had belonged to him; becauſe he was intereſted to make theſe entries. Outram *v.* Morewood, 5 T. R. 121. *Vide etiam*, Stead *v.* Heaton 4 T. R. 669. Lord Torrington's caſe, Salk. 285. Pilman *v.* Maddox, *Ib.* 690. Clerk *v.* Bedford, Bul. N. P. 282.

ADJOURNED

ADJOURNED SITTINGS IN LONDON.

WARING *v.* COX.

Monday, June 13.

The indorſement of a bill of lading, *without conſideration*, does not transfer any property in the goods; and therefore the mere indorſement of a bill of lading by the conſignor to an agent, to authoriſe him to ſtop the goods *in tranſitu* on account of his principal, will not enable ſuch agent to maintain aſſumpſit or trover for the goods in his own name.

ASSUMPSIT by the plaintiff as indorſee of a bill of lading, for 30 caſks of butter ſhipped at Sligo by B. Everard on board the Ceres, whereof the defendant was maſter, to be delivered at the port of London *unto the ſhipper's order or to his aſſigns.*

The goods in queſtion had been ſold by Everard at Sligo, to Baggott and Co. in London, to whom one bill of lading, indorſed by Everard had been forwarded. By virtue of this, Baggott and Co. got poſſeſſion of the goods upon the ſhip's arrival at London. A few days after, the plaintiff demanded the goods from the people on board the ſhip, under another bill of lading which he had received from Everard, and upon which the preſent action was brought. —The defendant's handwriting to this laſt bill of lading, and Everard's indorſement were now proved; but there was no evidence that the plaintiff had given any value for it. In fact he was merely Everard's agent, and employed by him to ſtop the goods *in tranſitu*, on account of the inſolvency of Baggott and Co. The counſel for the plaintiff relied upon the fact of the defendant having had notice before the

ſhip's

ſhip's arrival at London, that the goods were to be delivered not to Baggott and Co. but to Waring; and contended therefore that the latter alone was to be conſidered as the aſſignee of the ſhipper, to whom the defendant had contracted to deliver them.

Garrow for the defendant inſiſted, that at all events this action could not be maintained by the plaintiff, who being an indorſee *without value*, had no property in the goods; and cited *Cone v. Harden*, 4 Eaſt, 211. (*a*)

Park, *contrà*, contended that the plaintiff, as indorſee of the bill of lading, muſt be taken to have the legal property of the goods.

Lord ELLENBOROUGH. I am decidedly of opinion, that without value he has not. No caſe has gone ſo far as to decide, that a bill of lading is tranſferrable like a bill of exchange, and that the mere ſignature of the perſon entitled to the delivery of the goods *primâ facie* paſſes the property in them to

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(*a*)—In which caſe the queſtion aroſe, whether the mere indorſement of a bill of lading by the conſignor of goods, without any conſideration, would enable the indorſee to maintain trover for them in his own name.—It being held by the court that under the circumſtances of that caſe, the property in the goods had abſolutely veſted in the conſignee, ſo that the conſignor himſelf could not have ſued for them, it was not eſſentially neceſſary to decide this important queſtion; but the judges intimated a very ſtrong opinion in the negative, on the ground that no property paſſed by the bare indorſement of the bill of lading.

the

the indorſee. Much confuſion has ariſen from ſimilitudinary reaſoning upon this ſubject. There muſt be value upon the indorſement of a bill of lading, or no property in the goods is thereby transferred. The right to ſtop goods *in tranſitu*, is a perſonal right of the ſeller, and cannot be thus aſſigned to another. In this caſe the action, if maintainable at all, ſhould have been brought, not in the name of the agent, but of the conſignor himſelf.

Park then attempted to diſtinguiſh this caſe from *Coxe v. Harden*, as that was an action of *trover* and could not be maintained unleſs the plaintiff had ſome ſort of property in the goods, but here plaintiff complained that the defendant had broken his *contract*, according to which he was to deliver the goods to the aſſignee of the ſhipper. But

Lord ELLENBOROUGH ſaid, that for this purpoſe it made no difference whether the form of action was trover or aſſumpſit. If no property paſſed to the indorſee, he could have no right to complain of the non-delivery or of the converſion of the goods as an injury to himſelf.

Plaintiff nonſuited (*a*).

Park

(*a*) In this caſe the promiſe contained in the bill of lading was made, not to the plaintiff, but to a third perſon, viz. the conſignor of the goods. The plaintiff was not privy to it, and there was no conſideration for it moving from him to the defendant; —for which reaſon a breach of it could afford him no cauſe of action. Crow *v.* Rogers, Stra. 592. Bourne *v.* Maſon, 1 Ventr. 6. There

Park and *Gaſelee*, for the plaintiff.

Garrow and *Marryat*, for the defendant.

[Attornies, *Paſmore* and *Bill*.]

There are caſes which ſeem contrary to the general rule upon this ſubject, — as for inſtance Dutton *v.* Pool, 1 Ventr. 318, 332—Sir T. Raym. 302, where it was held, that aſſumpſit lay for the daughter, upon a promiſe by her brother to her father, to pay her 1000*l.* for her portion, in caſe the father would not fell timber for that purpoſe. So in an *Anonymous Caſe* mentioned 1 Ventr. 6— Bull. N. P. 134, a promiſe being made to a phyſician, that if he did ſuch a cure, the patient would give ſuch a ſum of money to himſelf, and another to his daughter, it was reſolved that the daughter might bring aſſumpſit for the money in her own name. But the reaſon aſſigned for theſe determinations was, that the nearneſs of the relation gave the daughter the benefit of the conſideration performed by her father. Perhaps they are ſcarcely reconcileable to the ſtrict principles of law, and aroſe from a wiſh to do what was juſt and equitable between the particular parties then before the court. — When an intereſt is transferred by the indorſement of a negotiable inſtrument, the indorſee may maintain an action upon it, though a ſtranger to the original conſideration; but that depends upon the uſage of merchants, or poſitive ſtatute.

Tueſday, June 14.

REDSHAW *v.* JACKSON AND ANOTHER.

In an action for money had and received, by the holder of a bill of exchange

ASSUMPSIT for money had and received. Plea, *the general iſſue.*

against a perſon who has received a ſum of money from the acceptor to ſatisfy it, any defence may be ſet up which would have been available, if the action had been brought againſt the acceptor himſelf.

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The plaintiff was indorſee of a bill of exchange for 939*l.* 15*s.* accepted by *Heſketh and Co.*; and now gave in evidence an acknowledgment by the defendants, of having received from the acceptors the like ſum of money to ſatisfy the bill.

The defence was, that this bill which had been drawn by *Morgan and Morley*, payable to their own order, had been indorſed by them to the plaintiff, after an act of bankruptcy, or at leaſt in contemplation of bankruptcy, and with a view to give him a fraudulent preference.

Jekyl for the plaintiff objected, that the defendants having acknowledged that they had a ſum of money in their hands for the plaintiff's uſe, it was not competent to them to ſet up ſuch a defence, even ſuppoſing that it might have been effectual to an action brought againſt the acceptors themſelves. But

Lord ELLENBOROUGH ſaid, as it was through the medium of the bill of exchange, that the plaintiff made out his right to the money in the defendants' hands, by impeaching his title to the bill, they ſhewed that he had no cauſe of action againſt them, and that though they had this ſum of money in their hands, it was not for his uſe, but for the uſe of the aſſignees of the drawers, or whoever might be legally entitled to the bill. The facts propoſed to be proved therefore were admiſſible evidence under the plea of non aſſumpſit in this action, in the ſame manner

as if an action had been brought upon the bill itſelf againſt the acceptors.

It appeared, however, that *Morgan and Morley* had not committed an act of bankruptcy until two days after the bill was indorſed, and that the plaintiff had been conſtantly preſſing them for payment of a debt due to him, ſo that they had not given him a voluntary preference.

The plaintiff therefore had a verdict.

Jekyl, *Scarlett*, and *Puller*, for the plaintiff.

Garrrow and *Lawes*, for the defendants.

[Attornies, *Alcock* and *Ruſſell.*]

" In order to recover money in this form of action, the party muſt ſhew that he has equity and conſcience on his ſide, and that he could recover it in a court of equity." *Per* Buller, J. 2 T. R. 370. *Vide* Moſes *v.* M'Ferlan, 2 Burr. 1005. Bize *v.* Dickaſon, 1 T. R. 285. Marriott *v.* Hampton, 7 T. R. 269. Ker *v.* Oſborne. 9 Eaſt, 378.

MILWARD *v.* TEMPLE.

Wednesday, June 15.

DEBT on bond.—Plea, *non eſt factum.*

In an action of debt on bond, an admiſſion of the hand writing of the atteſting witneſs preſumptively admits the delivery of the bond as the defendant's deed.

The plaintiff put in a paper ſigned by the defendant's attorney, whereby the ſignatures of the defendant and the atteſting witneſs to the bond were admitted.

Lord ELLENBOROUGH at firſt doubted whether the delivery of the bond by the defendant as his deed ought not alſo to have been admitted, or muſt not ſtill be proved, to entitle the plaintiff to a verdict; but upon conſideration, his lordſhip ſaid, as the atteſting witneſs's hand-writing was admitted, this might be taken as a preſumptive admiſſion of all he profeſſed to atteſt and would have been called to prove.

Whereupon the plaintiff had a verdict.

[Attornies, *Bickelack* and *Bell.*]

Vide Bul. N. P. 254. Adam *v.* Kerr, 1 Boſ. & Pul. 360. Abbot *v.* Plumbe, Doug. 215. Call *v.* Dunning, 4 Eaſt, 53. Faſſet *v.* Brown, Peak. Caſ. 23. Grellier *v.* Neale, *Ib.* 146. Cunliffe *v.* Sefton, 2 Eaſt, 183. Prince *v.* Blackburn, *Ib.* 250.

Same day.

WATTS AND OTHERS, ASSIGNEES, &c. *v.* THORPE.

2 Bing. 60.

In an action by the assignees of a bankrupt, entries made by the bankrupt in his books before the act of bankruptcy are good evidence to prove the petitioning creditor's debt.

TROVER by the assignees of a bankrupt to recover the value of certain goods which had belonged to the bankrupt and had been taken in execution at the suit of the defendant.

2 Bos. & P. 378.

To prove the petitioning creditor's debt, the bankrupt's books posted by himself were offered in evidence by the plaintiffs, and objected to on the other side.

1 Esp. N. P. C. 168.

Lord ELLENBOROUGH said, if the entries were made in the books before the act of bankruptcy, and the import of them was clear and unequivocal, they were to be considered in the same light as parol declarations of the bankrupt, and were therefore sufficient proof of the petitioning creditor's debt.

The plaintiffs however were not able to prove any act of bankruptcy before the defendant's execution, and submitted to be nonsuited.

Garrow, *Park*, and *Marryat*, for the plaintiffs.

Wilson and *Best*, for the defendant.

[Attornies, *Swain & Co.* and *Alexander*.]

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The general rule upon this ſubject ſeems to be, that aſſignees are to prove the petitioning creditor's debt by the ſame evidence which would have been ſufficient in an action againſt the bankrupt. *Vide* Co. B. L. c. 14. §. 4.

BORNMANN *v.* TOOKE.

Same Day.

ASSUMPSIT to recover the ſum of 2136*l.* for freight upon a cargo of timber carried from Riga to Portſmouth for the defendant, by the ſhip *Les Bons Enfans*, whereof the plaintiff was maſter.—Plea, the general iſſue.

By a charter-party between the plaintiff, the captain of a ſhip, and the defendant's agent abroad, for the carriage of timber from Riga to Portſmouth, at a ſtipulated rate per load, the former bound himſelf, after receiving his cargo on board *to ſail with the firſt favourable wind direct to the port of Portſmouth.* The ſhip however unneceſſarily entered the harbour of Copenhagen, where ſhe was detained ſeveral weeks, by means whereof the defendant was put to conſiderable expence in having freſh inſurances done upon her cargo. In an action of indebitatus aſſumpſit for the freight, *held*, that the plaintiff's covenant to ſail direct to Portſmouth was not a condition precedent; and that the deviation could not be given in evidence, either as a bar to the action, or to diminiſh the damages.

The ſhip in queſtion had been freighted by a charter-party, between the plaintiff and an agent of the defendant, dated 10th of April, 1807, and containing the following clauſe: "The freighter binds himſelf to load this ſhip with the greateſt expedition with a full and fit cargo of maſts, ſpars, and timber; *with which cargo the captain muſt ſail with the firſt favourable wind direct to the port of Portſmouth.*" The freight agreed upon was 3*l.* 5*s.* for each load of maſts and ſpars, and 2*l.* 15*s.* for each load of timber.

It was allowed that the ſhip had arrived at Portſmouth, and that the cargo had been there delivered

5 to

to, and accepted by the defendant.—His case was, that the ship had not sailed direct from Riga to Portsmouth, but had unnecessarily put into Copenhagen, on the 19th of July, where she was detained until that place surrendered to the English arms; on account of which deviation the defendant was obglied to have fresh insurances done upon her cargo. —But

Lord ELLENBOROUGH intimated an opinion that these facts were no defence to the present action.

Park, for the defendant contended, that the plaintiff's sailing with the first favourable wind direct to Portsmouth, was a condition precedent to the freight becoming due; and that the damage suffered by the defendant from the imperfect execution of the contract might at any rate be given in evidence to reduce the plaintiff's demand.

Lord ELLENBOROUGH. — I am of opinion that this was not a condition precedent, and that the defendant, having accepted the cargo, must pay the stipulated freight. To hold that any short delay in setting sail or trifling departure from the direct course of the voyage would entirely destroy the plaintiff's right to be remunerated for transporting the cargo, would indeed be going *inter apices facti* (*a*).

If

(*a*) *Vide* Constable *v.* Cloberie, Palm. 397. where the plaintiff covenanted in a charter-party, that his ship should sail with the next

If the plaintiff had proceeded merely on a *quantum meruit* for an indefinite ſum, you might have reduced the damages by ſhewing a deficient performance of the contract. But here there is a ſpecific agreement for ſpecific freight. Therefore the defendant muſt bring his croſs action for any loſs he may have ſuffered from the default of the plaintiff.

It was then ſuggeſted that the plaintiff not having performed the charter-party on his behalf, was driven from it to a *quantum meruit*, ſo as to let in the propoſed defence.

Lord ELLENBOROUGH however ſaid, that if the ſailing in the manner required by the charter-party was a condition precedent, then the plaintiff had no cauſe of action; but as it was not to be ſo conſidered, he had a right to recover for the freight according to the rate agreed upon.

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next wind upon a voyage to Cadiz; and the defendant covenanted that if the ſhip went the intended voyage and returned to the Downs, the plaintiff ſhould have ſo much for the voyage. The defendant traverſed that the ſhip ſailed with the next wind; and upon demurrer the traverſe was overruled; for the ſubſtance of the covenant was conſidered to be, that the ſhip ſhould perform the intended voyage, that being the primary intention of the parties, and not merely that ſhe ſhould ſail with the next wind, which might change every hour.—Where mutual covenants go only to a part of the conſideration on both ſides, and a breach may be paid for in damages, there the defendant having a remedy on his covenant, ſhall not plead it as a condition precedent. Boone *v.* Eyre, 1 H. Bl. 273. n. Campbell *v* Jones, 6 T. R. 570. Hall *v.* Cazenove, 4 Eaſt, 477.

The

The plaintiff had a verdict accordingly.

Garrow and *Gaſelee* for the plaintiff.

Park and *Abbott* for the defendant.

[Attornies, *Gregſon* and *Dewon.*]

Vide Farnſworth *v.* Garrard, *ante* 38. Fiſher *v.* Samuda, *ante* 190.

CASES

ARGUED AND RULED AT

NISI PRIUS

IN K. B.

In and after Trinity Term,

48 GEORGE III. 1808.

FIRST SITTINGS IN TERM IN LONDON.

CRAIG, ADMINISTRATRIX, &c. *v.* CUNDELL. Friday, June 24.

In an action at the ſuit of an executor or adminiſtrator, if the eſtate of the teſtator or inteſtate is inſolvent, a perſon who has an unſatisfied demand upon it, is not a competent witneſs for the plaintiff.

ASSUMPSIT for work and labour done and performed by the plaintiff's inteſtate for the defendant.—Plea, the general iſſue.

To prove the plaintiff's caſe a witneſs was called, who, being examined on the *voire dire*, ſaid he had a demand upon the inteſtate's eſtate, but that he had made no application for payment, as there were no funds out of which he could be ſatisfied.

Topping objected to his competency, on the ſcore of intereſt, as he came to create a fund, from which he might receive payment of his debt.

Park, *contrà*, contended that the objection went to the credit not the competency of the witneſs. A perſon having a demand upon the eſtate of a bankrupt is not a competent witneſs for the aſſignees (*a*); becauſe they are bound to make a rateable diſtribution amongſt all the creditors, and a creditor admitted as a witneſs would be ſure to receive a certain proportion of the ſum recovered by his evidence. But an executor or adminiſtrator, may lawfully give a preference amongſt the creditors in equal degree of the teſtator or inteſtate, and after an action commenced by one creditor may confeſs a judgment to another: The witneſs in this caſe, therefore, has no greater certainty of profiting by a verdict againſt the defendant, than if the action had been brought by the inteſtate in his life-time, and can entertain only a contingent expectation of advantage, which the law does not conſider as giving ſuch a bias to the mind as to conſtitute a diſqualification (*b*).

Lord ELLENBOROUGH.—It ſtrikes me that the witneſs has ſuch an intereſt in the verdict as to render him incompetent. At preſent he has no means of obtaining any ſort of ſatisfaction for his debt; but if the Plaintiff ſucceeds in this action, a fund will be created out of which he may be ſatisfied. He gives evidence to get money for himſelf through the medium of

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(*a*) Shuttleworth *v.* Bravo, 1 Stra. 507. But a creditor who has ſold his chance of recovering a debt is a good witneſs for the aſſignees. Granger *v* Furlong, 2 Black. Rep. 1273.

(*b*) Leach Cro. Caſ. 151. Gilb. Law Ev. 124.

the adminiſtratrix, who may be conſidered as his truſtee (*a*).

The cauſe was afterwards referred.

Park and *Eſpinaſſe* for the plaintiff.

Topping for the defendant.

(*a*) *Vide* Brady *v.* Shiel, *adminiſtratrix*, *ante* 148, where a mode is pointed out by Sir JAMES MANSFIELD, C. J. of compelling a rateable diſtribution of the effects of a perſon who dies inſolvent amongſt all his creditors.

CHALMERS AND OTHERS *v.* LANION.

Same day.

ACTION by the indorſees of a bill of exchange againſt the acceptor.

In an action by the ſecond indorſee againſt the acceptor of a bill of exchange, if the perſon who indorſed it to the plaintiff could himſelf have maintained an action upon it, the defendant cannot give in evidence that it was accepted for a debt contracted in ſmuggling, although it was indorſed to the plaintiff *after it had become due.*

One of the grounds of defence was, that the bill had been accepted for a debt contracted in a ſmuggling tranſaction; and that although it had been indorſed for value before it became due to a *bonâ fide* holder, yet that it had been indorſed by him to the preſent plaintiffs *after it was due.*—The counſel for the defendant allowed that the firſt indorſee might have ſued upon it (*a*); but contended that it came diſgraced

(*a*) Newby *v.* Smith, 2 Eſp. Caſ. 539.

to the plaintiffs; that they took it ſubject to all the deficiencies under which it had at any time laboured; and that it was now competent to the defendant to give the original conſideration in evidence, in the ſame manner as if the action had been brought by the payee.—But

Lord ELLENBOROUGH held, that if the plaintiffs received the bill from a perſon who might himſelf have maintained an action upon it, the circumſtance of the indorſement to them having been made after the bill had become due was inſufficient to let in the propoſed defence; and, on a motion for a new trial, the other Judges of K. B. declared themſelves of the ſame opinion.

Park and ——— for the plaintiffs.

Jervis and *Lawes* for the defendant.

Vide Tinſon *v.* Francis, *ante* 19.

Same day.

MASON *v.* T. RUMSEY SEN. and T. RUMSEY JUN.

If a bill of exchange is drawn upon a firm, and one of the partners accepts it in his own name, this acceptance binds the copartnerſhip.

THIS was an action againſt the defendants as acceptors of a bill of exchange.

The action was defended only by T. Rumſey, junior, who contended he was not liable as a joint acceptor.

The

The bill was drawn upon "Meſſrs. Rumſey and Co." and being ſhewn to T. Rumſey, jun. he wrote acroſs it "*accepted, T. Rumſey, ſen.*" The plaintiff's caſe, therefore, was, that the defendants were partners, and that this acceptance bound both,

Nolan, as counſel for T. Rumſey, jun. inſiſted that even if he was a partner with his father (which was ſtrenuouſly denied) this acceptance would not bind him. If a bill was drawn upon a firm, it muſt be accepted in the name of the firm, or by one partner for himſelf, and his copartners; otherwiſe the holder might proteſt the bill, as the mere ſignature of a ſingle partner was binding only upon himſelf. This doctrine was well known amongſt merchants, and was countenanced in a treatiſe on bills of exchange very much reſpected by the profeſſion (*a*). T. Rumſey, jun. was therefore to be regarded in this tranſaction as merely the agent of his father, and not as himſelf a party to the bill.

Lord ELLENBOROUGH.—There is no foundation for the doctrine contended for. This acceptance does not prove the partnerſhip; but if the defendants were partners, they are both bound by it. For this purpoſe it would have been enough if the word "*accepted*" had been written on the bill, and the effect cannot be altered by adding "*T. Rumſey, ſen.*" If a bill of exchange is drawn upon a firm, and accepted by one of the partners, he muſt be underſtood

(*a*) Chitty on Bills, 127, 2d e d.

to exercise his power to bind his copartners, and to accept the bill according to the terms in which it is drawn.

The plaintiff had a verdict.

A motion was afterwards made for a new trial on the ground that there was not sufficient evidence to establish a partnership; but the direction of the Chief Justice at nisi prius was acquesced in.

Park and *Marryat* for the plaintiff.

Nolan for the defendant.

Vide Lord Galway *v.* Matthew, & Lyon *v.* Sundius, *post*.

SECOND

SECOND SITTING IN TERM AT WESTMINSTER.

GREY *v.* SMITH AND ANOTHER, SHERIFF OF MIDDLESEX.

Wednesday June 29.

In an action of trespass against the sheriff for seizing the plaintiff's goods, to connect the defendant with the trespass, it is sufficient to prove the warrant under which the goods were seized by the bailiff.

If a *receipt* for money and an *agreement* are written on the same piece of paper, this is receivable in evidence as a receipt, if it has a receipt stamp, without an agreement stamp

TRESPASS for breaking and entering the plaintiff's house and seizing his goods.—Pleas, *not guilty*, and a justification under a writ of *fi. fa.* against the goods of a person of the name of Raine.

The only evidence to connect the defendants with the trespass was, the warrant from them to the bailiff under the fi. fa.—which, it was contended, was not sufficient, as the writ itself ought to have been produced.—But

Lord ELLENBOROUGH said, that the warrant *primâ facie* made the defendants trespassers, if there was a levy under it, and that it was their business to prove the writ as a part of their justification.

To shew that the goods seized were the property of the plaintiff and not of Raine, a paper was afterwards offered in evidence as a receipt, whereby Mr. Young, who had been landlord of a house occupied by Raine's wife, and had taken the goods

as a diſtreſs, acknowledged that he had received from the plaintiff the ſum of 120*l.* 2*s.* 6*d.* as the price of them; — and which further contained an undertaking on his part to allow them to remain on the premiſes. This paper had only a receipt ſtamp.

Wigley, for the defendants, objected, that as it contained an agreement, it could not be received in evidence without an agreement ſtamp (*a*).

Lord ELLENBOROUGH, however, held, that it might be received in evidence as a receipt on the principle, *utile per inutile non vitiatur*. If what followed had at all controuled or qualified what went before, he ſhould have rejected the paper *in toto*, without an agreement ſtamp; but as it contained a ſimple acknowledgment of the money being paid, a receipt ſtamp made it legal evidence of that fact, notwithſtanding that ſomething elſe was inſcribed upon it.

The plaintiff had a verdict.

Dampier for the plaintiff.

Wigley for the defendant.

[Attornies, *Grey* and *Dobie*.]

(*a*) 23 G. III. c. 58. § 1. *Vide* Waller v. Horsfall, *poſt*: 531.

FIRST

FIRST SITTING AFTER TERM AT WESTMINSTER.

NORTH *v.* MILES, KNT. AND ANOTHER, LATE SHERIFF OF MIDDLESEX.

Thurſday, July 7.

CASE for a falſe return of *non eſt inventus*.

In an action againſt the ſheriff for a falſe return to a writ, what was ſaid by the bailiff to whom to the warrant under it was directed, when aſked by the plaintiff's attorney before the return of the writ, why he did not execute it, is evidence againſt the ſheriff.

The writ was ſued out by the plaintiff againſt a gentleman of the name of *Bromley*, who was acting at the time as under ſheriff to the defendants. The warrant had been directed to one *Leach*, who appeared to have been accuſtomed to execute writs for the Sheriff, although not proved to be a bound bailiff.

Leach being now called, ſwore, that he had uſed great exertions to take *Bromley*, without being able to find him. Evidence was however given, that after the writ had been delivered to the ſheriff, and before its return, *Bromley* was attending the poll at Brentford during the Middleſex election, where one of the defendants preſided as returning officer: and to ſhew that *Leach*, by his own acknowledgment, might have arreſted him, it was propoſed to aſk the plaintiff's attorney, what *Leach* had ſaid to him, when he enquired why the writ was not executed?

The *Attorney General* objected, that what then paſſed could not be evidence againſt the defendants, and that the plaintiff muſt be ſatisfied with what he could extract from *Leach* himſelf.

Lord ELLENBOROUGH.—The bailiff's general converſation with any indifferent perſon certainly is not evidence againſt the ſheriff; but what he ſaid on this occaſion, when remonſtrated with by the plaintiff's attorney, muſt be conſidered as part of his act touching the execution of the writ, for which the defendants are reſponſible. Where a thing is carried on by one as a *quaſi* principal, what he ſays in the courſe of the tranſaction has been held on great conſideration to be evidence againſt thoſe he repreſents.

The witneſs then ſtated that Leach had declared, he dared not execute the writ, as Bromley had written that he would ſuſpend any officer who had the audacity to arreſt him; but that if he had an indemnity from one of the ſheriffs, he would take him tomorrow.

The plaintiff had a verdict for the full ſum for which Bromley ought to have been held to bail.

Park and *Littledale* for the plaintiff.

Attorney General, *Garrow* and *Comyn* for the defendants.

[Attornies, *Lee* and *Smith*.]

Bowſher

Bowſher v. *Calley, Eſq. ſheriff of Wilts.* Sittings after T. T 48 Geo. III.

Action for the eſcape of one *Lancaſhire* taken under a ca. ſa. at the ſuit of the plaintiff. Lancaſhire being arreſted in Wilts by an officer of the defendants of the name of *Ginder*, to whom the warrant was directed, was immediately brought by him to Bath, where the plaintiff reſided.—Some queſtions being put as to what Ginder ſaid while he had Lancaſhire in his cuſtody at Bath, an objection was made that he ought to be called himſelf, and that what he ſaid could not be evidence againſt the ſheriff: but Lord Ellenborough held, that what he then ſaid about bringing Lancaſhire to Bath was part of the act for which the defendant was reſponſible, and that the queſtions were therefore regular.—However, it afterwards appeared that Lancaſhire had been brought to Bath by the plaintiff's own directions, and the defendant had a verdict.

Vide Yabſley v. Doble, 1 Ld. Raym. 190. — Biggs v. Lawrence, 3 T. R. 454. — Maeſters v. Abraham, 1 Eſp. N. P. Caſ. 375. — Helyear v. Hawke, 5 Eſp. N. P. Caſ. 72. — Bauerman v. Radenius, 7 T. R. 663.

FIRST

FIRST SITTINGS AFTER TERM IN LONDON.

Friday July 8.

ALNER *v.* GEORGE.

2 Camp. 561.

A Judge at *nisi prius* has no equitable jurisdiction, and can only look to the strict legal rights of the parties upon the record. Therefore, if in an action for goods sold the defendant proves *a receipt in full* signed by the plaintiff, evidence cannot be admitted by way of answer to this defence, that the plaintiff had assigned all his effects for the benefit of his creditors; that the action was brought by his trustees in his name; that no money passed when the receipt was given; and that the plaintiff on the record and the defendant had colluded together to defeat the action;—although, upon an application to the court *in banco*, it might have interposed to prevent the defendant from availing himself of a receipt obtained under such circumstances.

ASSUMPSIT for goods sold and delivered.—Plea, the general issue.

The sum claimed was 1382*l.*; and it was not disputed that a debt to this amount for goods sold had existed; but on the part of the defendant, there was given in evidence an account stated between the parties on the 23d of December 1807, together with a receipt for the balance then found to be due, which was declared to be "in full satisfaction of all demands of the plaintiff upon the defendant."

To meet this defence, it was proposed to prove that before the date of the receipt *Alner* had assigned the whole of his effects for the benefit of his creditors; that the defendant had full notice of this assignment; that in reality no money passed upon the giving of the receipt; that the whole was a collusion between them to cheat the creditors; and that though *Alner* was nominally the plaintiff on the record, the action was

Qu. W. this Evidence might not have been received?

brought

brought in his name by the truſtees, on behalf of themſelves and the other creditors.

Lord ELLENBOROUGH intimating an opinion, that unleſs *Alner* was impoſed upon, the receipt was a bar to the preſent action,—

The caſe of *Legh* v. *Legh*, 1 Boſ. & Pul. 447, was cited as in point, where the obligor of a bond, after a notice of its being aſſigned, having taken a releaſe from the obligee, and pleaded it to an action brought by the aſſignee in the name of the obligee, the court of C. P. ſet the plea aſide, and under theſe circumſtances would not allow the obligor to plead payment of the bond.

Lord ELLENBOROUGH.—There the court, upon an application to their equitable juriſdiction, ſet aſide the plea. If any motion had been made in term time to prevent the defendant from availing himſelf of this defence, perhaps we might have interfered. Sitting here I can only look to the ſtrict legal rights of the parties upon the record; and there can be no doubt that a receipt in full, where the perſon who gave it was under no miſapprehenſion and can complain of no fraud or impoſition, is binding upon him. The caſe cited is completely miſapplied. The plaintiff might have releaſed the action; and it is impoſſible to admit evidence of his attempting to defraud others, and to recognize the transfer of choſes in action, without confounding all legal diſtinctions.

The

The plaintiff was nonſuited.

Park and *Comyn* for the plaintiff.

Garrow and *Eſpinaſſe* for the defendant.

[Attornies, *Pullen* and *Peach.*]

So the defendant may give in evidence the declarations or admiſſions of the plaintiff on the record to defeat the action, although ſuch plaintiff appear to be only a truſtee for a third perſon. Bauerman v. Radenius, 7 T. R. 663. — Craib v. D'Aeth, *Ib.* 670 *n.*

Where a receipt in full has been obtained by fraud or miſrepreſentation it will be conſidered as a nullity.—*Benſon* v. *Bennett.* C. P. Sittings after M. T. 49 G III. Money had and received, by a mariner againſt the owner of a South-ſea whaler, carrying a letter of marque, to recover the plaintiff's proportion, viz. $\frac{1}{50}$ of the proceeds of a prize which ſhe had taken. The defendant ſet up as a bar to the action a receipt ſigned by the plaintiff for 500*l.* declared to be in full of all demands in reſpect of the prize. But it appearing that the defendant repreſented to the plaintiff when the receipt was given, that the proceeds of the prize amounted only to 25,000*l.*, whereas in fact they exceeded 40,000*l.* Sir JAMES MANSFIELD held, that the receipt was not binding, and the plaintiff had a verdict for the additional ſum of 337*l.* — *Vide* Straton v. Raſtall, 2 T. R. 366.

Same day.

GREGORY v. PARKER.

In an action againſt a huſband for goods ſupplied to his wife for her accommodation while he occaſionally viſited her, a letter written by the wife acknowledging the debt within ſix years, is admiſſible evidence to take the caſe out of the ſtatute of limitations.

ACTION for goods ſold and delivered.—Plea, the the ſtatute of limitations.

The

The goods in queſtion had been furniſhed above ſix years ago for the accommodation of the defendant's wife, who then lived at Brighton, the defendant occaſionally viſiting her. To take the caſe out of the ſtatute, a letter addreſſed to the plaintiff was offered in evidence, written within the ſix years from Brighton by the defendant's wife, in which ſhe admits the debt, and apologizes for its not being paid.—It was contended for the defendant, that this letter was not evidence againſt him, as the wife had no authority to write it, and the debt in the mean time might have been paid.

Lord ELLENBOROUGH.—The goods having been ſupplied for the wife's accommodation, I think ſhe may be conſidered as her huſband's agent reſpecting them, and that her letters are admiſſible evidence of an acknowledgment of the debt within ſix years to take the caſe out of the ſtatute. If there be any evidence of payment in the mean time, I am ready to receive it.

The plaintiff had a verdict.

Park and *Lawes* for the plaintiff.

Reader for the defendant.

[Attornies, *Wild* and *Johnſon*.]

Vide Palethorp *v.* Furniſh, 2 Eſp. Caſ. 511. — Burt *v.* Palmer, 5 Eſp. Caſ. 145.

AD.

ADJOURNED SITTINGS AT WESTMINSTER.

Tuesday, July 12.

TOWNSON *v.* WILSON AND OTHERS.

An action lies to recover back money paid to parish officers by a person taken up under a warrant as the putative father of a bastard child, by way of bargain with the parish to be released from all liability respecting the child,—against those who received the money; although before the commencement of the action they may have gone out of office, and accounted with their successors for so much of the money as was not expended on the child and its mother during her lying-in. —However, in such action, the plaintiff is only entitled to recover the surplus, after these charges have been deducted.

ASSUMPSIT for money had and received.—**Plea,** the general issue.

The plaintiff, in the beginning of April 1807, being taken up under a magistrate's warrant at the instance of the defendants, the parish officers of St. Thomas, Southwark, on a charge of having gotten one Elizabeth Gibbs, spinster, with child, paid them the sum of 40*l.* for which they gave him a receipt in the following form:

"Received by the parish officers of St. Thomas, "Southwark, from J. Townson, the sum of 40*l.* to "indemnify him of all future charges that may ac- "crue, by the birth of a child or children, of the "body of Elizabeth Gibbs, spinster."

{Signed by the defendants respectively, as church-wardens, &c.

The woman was afterwards delivered of a child, which only lived eleven weeks.

It

It appeared that the defendants had ceaſed to be officers of the pariſh of St. Thomas, Southwark, before the commencement of the action, and that, upon going out of office, they had paid over to their ſucceſſors ſo much of the money received from the plaintiff as was not expended about the lying-in of the woman, and the maintenance of the child.

Garrow contended, that under theſe circumſtances, the action could not be ſupported. The money had been paid to the defendants in their public capacity, and they could no longer be anſwerable for it, after part was expended, and the reſidue regularly paid over to their ſucceſſors in office. It could not be ſaid that the tranſaction was altogether illegal; as the whole of the ſum might have been neceſſary to defray the expences of the lying-in, and the rearing of the infant. The action therefore ought to have been brought, not againſt theſe individuals, but againſt the preſent church-wardens and overſeers of the poor of the pariſh of St. Thomas, Southwark, in whoſe hands the ſurplus of the money actually was.

Lord ELLENBOROUGH.—If any perſon gets money into his hands illegally, he cannot diſcharge himſelf by paying it over to another; and the contract under which this money was paid, was certainly illegal, as it gave the pariſh an intereſt in abridging the life of the child. When this queſtion firſt came before me, on account of its novelty, I conſulted the other judges upon it; and I found that they (including a noble friend of mine now no more) were of the ſame opinion. The chief objection to the action appears to

be, that the parties may be repreſented as *in pari délicto*; but that cannot be ſaid in this inſtance, as the plaintiff had been arreſted, and was under dureſs when he depoſited the money with the defendants.—I am of opinion, however, that there ſhould be a deduction, by way of ſet off, from the 40*l.* for ſo much as the defendants expended about the lying-in of the mother, and the maintenance of the infant.

The plaintiff had a verdict for 31*l.* 12*s.*

Park and *Wigley* for the plaintiff.

Garrow and *Lawes* for the defendant.

[Attornies, *Phillips* and *Clutton.*]

It ſeems that the difficulty in theſe caſes, of the parties being *in pari delicto*, may be obviated, by ſuppoſing the money to be paid by the putative father to the pariſh officers under a mutual miſtake, and for a conſideration which cannot be performed.

Anonymuos. -- York Lent Aſſizes, 1808. Cor. LAWRENCE, J. —Action to recover back money paid by plaintiff to defendants, (pariſh officers), for indemnifying the pariſh againſt a baſtard child. The plaintiff had paid 40*l.* for this purpoſe, and 4*l.* only had been expended upon the child, when it died.—It was contended on the part of the plaintiff, that this money was paid under a miſtake, both parties imagining that the pariſh might be indemnified in the manner propoſed, and that nothing was more clear than that money paid under ſuch a miſtake might be recovered back.—*Park*, for the defendants, inſiſted that the money was illegally paid; that the parties were *in pari delicto*; and that, though the contract could not have been inforced, yet the money being paid could not be recovered back.

LAWRENCE, J. This is no *delictum*. The money was paid upon a ſuppoſed conſideration, which cannot be effected, and may

may therefore be recovered back as money had and received to the plaintiff's uſe.

So, if a promiſſory note is given to pariſh officers as an indemnity againſt a baſtard child, they can only recover upon it ſo much as the pariſh has expended upon the child and its mother. —Cole *v.* Gower, 6 Eaſt, 110; and no action at all can be maintained upon the note, if the pariſh has not been damnified.—Wilde *v.* Griffin, 5 Eſp. Caſ. 141.

REX *v.* ROBERTS AND OTHERS.

Thurſday, July 14.

In an indictment againſt defendants for a conſpiracy to cauſe themſelves to be believed perſons of large property, for the purpoſe of defrauding tradeſmen, the proſecutor may prove various inſtances of their giving a falſe repreſentation of their circumſtances, as overt acts of the conſpiracy.

THIS was an indictment againſt the defendants, which charged, that being perſons of evil fame, and in low and indigent circumſtances, they conſpired together to cauſe themſelves to be reputed perſons of conſiderable property, and in opulent circumſtances, for the purpoſe of defrauding one A. B. &c.

Evidence being given of their having hired a houſe in a faſhionable ſtreet, and repreſented themſelves to one tradeſman employed to furniſh it as people of large fortune; a witneſs was called to prove, that at a different time, they had made a ſimilar repreſentation to another tradeſman.

Marryat objected, that it was not competent to the proſecutor to give evidence of various acts of this ſort, and that he was bound to ſelect and confine himſelf to one. It was impoſſible for a man to come prepared to explain all the tranſactions of his life; and if this

mode of fixing a crime upon an individual were allowed, no one could be ſecure.

Lord ELLENBOROUGH.—This is an indictment for a conſpiracy to carry on the buſineſs of common cheats, and cumulative inſtances are neceſſary to prove the offence. The ſame ſort of evidence is allowed in an indictment for barratry; and in a proſecution for high treaſon itſelf, the graveſt of all offences, *if* the indictment lays that the priſoner imagined the death of the King, and in purſuance of ſuch imagination wrote divers letters to the enemies of our Lord the King, or held divers conſults upon that ſubject, evidence may be given of the priſoner's having written any treaſonable letter, or attended any meeting held for treaſonable purpoſes. The objection is unfounded.

The defendants were all found guilty.

The *Attorney General* and *Gaſelee* for the proſecution.

Marryat for the defendants.

[Attornies, *Butler* and *Smith*.]

Vide Eaſt, P. C. Ch. II. § 7—9. 54.

DUFFELL, ESQ. *v.* WILSON.

Friday, July 15.

ASSUMPSIT on a promiſe, in conſideration of receiving the ſum of 4*l.* 4*s.* to indemnify plaintiff, in caſe he ſhould be drawn to ſerve in the militia, under an Act of Parliament paſſed in the 47th year of the King, intitled, "An act for the ſpeedily completing the militia of Great Britain, &c.;"—with the common money counts.—Plea, *the general iſſue.*

If A. in conſideration of a premium, undertakes to inſure B. againſt being drawn for the militia under a particular ſtatute, until a certain day; and repreſents that on that day all balloting under the ſtatute will ceaſe, and that B. will be completely ſecured by the inſurance againſt the operation of the ſtatute,—A. is not thereby bound to indemnify B. in conſequence of his being drawn for the militia under the ſtatute, after the above mentioned day: But, on account of the miſrepreſentation, the contract is void, and B. may recover back the premium, as money had and received.

The above act paſſed on the 14th of Auguſt 1807, and on the 27th of October following, the plaintiff paid to the defendant, as treaſurer of an inſurance ſociety, a ſubſcription of four guineas; on which occaſion, he received a receipt in the following form:—

"Received of J. H. Duffell, Eſq. 4*l.* 4*s.* being his ſubſcription to the ſociety held for the purpoſe of indemnifying ſuch perſons as may be drawn before the 1ſt day of February 1808, to ſerve in the militia to be raiſed by virtue, and under the direction of an act of parliament paſſed, &c.

"No perſon will be entitled to any benefit from this ſociety who has actually been ballotted prior to, or on the date of this receipt, which will expire by the 31ſt of January 1808; *by which period, all ballottings under this act are directed to ceaſe.*"

The plaintiff was likewiſe informed at the time of ſubſcribing, that he was ſecured completely againſt the

operation of the act. On the 9th of February, however, he received a letter from the defendant, informing him that the ballotting under the act was to continue for three months longer, and that to be insured during that period, he must pay an additional premium of 1*l.* 11*s.* 6*d.* The plaintiff having refused to comply with this demand, was drawn as a militiaman on the 19th of February, and was obliged to pay a fine of 18 guineas.

Lord ELLENBOROUGH held, that since the 1st day of February 1808 was expressly mentioned in the receipt as the period to which the indemnification was to extend, neither the clause that followed, nor the verbal assurances were sufficient to raise a promise on the part of the defendant to indemnify the plaintiff during the subsequent operation of the act; but that there had been a misrepresentation on the part of the defendant, which rendered the contract void, and that although the plaintiff could not recover the 18 guineas under the special counts, he was entitled to the four guineas, as money had and received to his use.

Verdict accordingly.

Scarlett and *Littledale* for the plaintiff.

Garrow and *Marryat* for the defendant.

But if the defendant had only said that he *believed* or *expected*, that all ballottings under the act would expire on such a day, he would have been entitled to retain the premium.—Pawson *v.* Watson, Cowp. 787.—Barber *v.* Fletcher, Doug. 292.

LORD GALWAY *v.* MATTHEW AND SMITHSON.

Same day.

THIS was an action againſt the defendants, as ſurviving partners of T. Whitſmith, on a promiſſory note, in the following form, made and ſigned by Matthew :—

If A. B. and C. are in partnerſhip, and A. draws a promiſſory note, by which he promiſes *individually* to pay the money, and which he ſigns with his own name only, but prefixing to his ſignature, "*for A. B. and C.*," this binds the whole partnerſhip.

December 16th, 1805.

Sixty days after date, I pay Lord Viſcount Galway, or order, 200*l.* value received. For J. Matthew, T. Whitſmith, and T. Smithſon.

J. MATTHEW.

The *Attorney General* contended, that this note was binding only on Matthew, who ſigned it. He allowed the caſe would have been different, had it been "*we* pay;" but the note, in its preſent form, was a mere perſonal undertaking by Matthew to pay a ſum of money ſuppoſed to be due from himſelf and his co-partners.

Lord ELLENBOROUGH held, however, that a note made in this manner, was ſufficient on the face of it to bind the whole firm.

It was afterwards proved, that before the date of this note, Smithſon had advertiſed in a newſpaper read by the plaintiff, that he would not be anſwerable for any bills or notes iſſued by Matthew in the name

of the partnerſhip; and on this ground there was a verdict for the defendants, which the court of K. B. afterwards refuſed to ſet aſide (*a*).

Topping and *Wigley* for the plaintiff.

The *Attorney-General* for the defendants.

[Attornies, *Sykes* and *Smart*.]

(*a*) *Vide* 10 Eaſt, 264.

In Alderſon v. Pope, Sittings after M. T. 49 G. III.—Lord Ellenborough held, that where there was a ſtipulation between A. B. and C. who appeared to the world as co-partners, that C. ſhould not participate in the profit and loſs, and ſhould not be liable as a partner, C. was not liable as ſuch to thoſe who had notice of this ſtipulation, and that notice to one member of a firm was notice to the whole partnerſhip.

Same day.

REX v. MARY ANN TAYLOR.

An indictment for perjury in a written depoſition before a magiſtrate, in which a word neceſſary to the ſenſe had been omitted, in ſetting out the *ſubſtance* and *effect* of the depoſition, ſupplied a word according with the ſenſe, as if it had actually ſtood in the depoſition. Held to be a fatal variance. The depoſition ſhould have been literally ſet out, and the meaning explained by an *innuendo*.

THIS was an indictment for perjury in exhibiting articles of the peace againſt Samuel Naylor.

The indictment ſtated that the defendant went before a juſtice of the peace, and ſwore in ſubſtance and to the effect following (that is to ſay), "that the ſaid Samuel Naylor, on the 1ſt day of January in the

year

year of our Lord 1808, in the parish of St. Mary-le-Bonne in the county of Middlesex, made an assault upon her the said Mary Ann Taylor with an umbrella, and *at the same time* threatened to shoot her with a pistol."

The information, when produced from the public office in Bow-street, stated the assault with the umbrella, in the same words as in the indictment; but it then went on to say, "and at the same threatened to shoot her, &c." without mentioning the word *time*.

Raine for the defendant pointed this out as a fatal variance.

Garrow, on the other side, allowed it would have been so if the indictment had undertaken to set out the tenor of the deposition; but as it only professed to set out its substance and effect, there could be no objection to supplying the word *time*, which was necessary to make either sense or grammar of the sentence.

Lord ELLENBOROUGH.—I am of opinion that the words ought to be set out exactly as sworn, and that if there be any mistake or ambiguity, that can only be remedied by an innuendo. Here the indictment might have stated "at the same (meaning thereby at the same time) threatened, &c." —but the information might have meant at the same *place*; and it is quite impossible to say that the allegation in the indictment is supported by the information given in evidence.

Defendant

Defendant acquitted.

Garrow and *Marryat* for the plaintiff.

Raine for the defendant.

[Attornies, *Davies* and *Holmes*.]

Rex. *v.* Windus. — Same day. — Indictment for perjury, at a trial at Ni. Pri. The indictment ſtated that an action was depending wherein H. K. was the plaintiff and B. F. the defendant. When the Judgment was produced it began in this manner: "B. F. ſued by the name of L. F. was attached to anſwer H. K. &c." Lord Ellenborough held there was no variance; for although the indictment did not give F. his full deſcription as in the judgment, it gave him his true one. The defendant was found guilty. *Vide* Amey *v.* Long, *ante* 15.

ADJOURNED SITTINGS IN LONDON.

SHUTTLEWORTH *v.* STEPHENS.

Thurſday, July 21.

An inſtrument in the common form of a bill of exchange, except that the word *at* is ſubſtituted for *to*, before the name of the drawees, may be declared on as a bill of exchange; or, *cone ſemble*, may be treated as a promiſſory note, at the option of the holder.

THE declaration was in the common form as upon *a bill of exchange*, drawn by the defendant on Meſſrs. John Morſon and Co., payable to John Jenkins, and indorſed by him to the plaintiff.

In ſupport of the action a paper writing, of which the following is a copy, was given in evidence:

"21ſt October 1804.

"Two months after date pay to the order of "John Jenkins 78*l.* 11*s.* value received.

THOS. STEPHENS.

"At Meſſrs. John Morſon and Co."

Lord ELLENBOROUGH held, that this was properly declared on as a bill of exchange; and that Meſſrs. Morſon and Co. might be conſidered as the drawees; although perhaps it might have been treated as a promiſſory note at the option of the holder (*a*).

(*a*) Mr. Juſtice Lawrence having been applied to for leave to add a count to this declaration as on a promiſſory note, refuſed to interfere, ſaying that he thought it unneceſſary.

The

In an action by the indorſee againſt the drawer of a bill of exchange drawn without conſideration, the payee who indorſed it to the plaintiff, in payment of goods, is a competent witneſs to prove the conſideration for the indorſement.

The defence anticipated was, that the bill had been drawn without any conſideration; and to meet this, Jenkins the payee was called, who ſaid that he had indorſed it to the plaintiff before it become due, in payment of goods ſold.

Park objected to the competency of this witneſs on the ſcore of intereſt; as, if the plaintiff could not ſue the preſent defendant upon the bill, he might ſtill bring an action againſt Jenkins for the price of the goods.—But

Lord ELLENBOROUGH ſaid, the witneſs had an equal intereſt either way; for though if this action failed, he would be liable to the Plaintiff for goods ſold, yet if it ſucceeded, he would be liable to the defendant for money paid.

The plaintiff had a verdict.

The *Attorney-General*, *Garrow*, and *Dampier* for the plaintiff.

Park for the defendant.

[Attornies, *Jones* and *Shepherd*.]

Jr. Indorſer.

But in an action by the indorſee againſt the maker of a promiſſory note without original conſideration, if the maker has become bankrupt and obtained his certificate ſubſequently to the date of the note, he is not a competent witneſs for the defendant. —— *Maundrell* v. *Kennett*, G. H. Sittings in H. T. 1809. Cor. BAYLEY, J. Action by the indorſee againſt the

the maker of a promiſſory note for 150*l.* Defence, that it was an accommodation note, and had been indorſed to the plaintiff after it became due. To prove this, *Howard* the payee and indorſer was called: but being examined on the *voire dire*, it appeared that ſince the date of the note he had become bankrupt, and had obtained his certificate. — BAYLEY J. held that he was not a competent witneſs, as he was no longer liable to the plaintiff, but would be liable to the defendant, if the latter were obliged by this action to pay the promiſſory note drawn for his accommodation. The plaintiff had a verdict. — *Vide* Chitty on Bills, 2d ed. 282, 3, 4, — where all the caſes on this abſtruſe ſubject are collected.

ATTERSOL *v.* BRIANT.

Friday, July 22.

TROVER for 5000 bricks.

If A. ſends goods by B. a common carrier, to be delivered to C., proof that B. aſſerted he had delivered the goods to C., whereas in truth C. had never received them, is not ſufficient evidence of converſion to ſupport trover againſt B.

The caſe opened on the part of the plaintiff was, that the bricks in queſtion had been ſent to the defendant, to be carried by him as a common carrier, and delivered to one Stiles; that he had aſſerted to the plaintiff he had delivered them to Stiles accordingly; but that in truth he had not done ſo, and they had never reached Stiles's hands. Under theſe circumſtances, it was contended, the defendant muſt be taken to have converted the bricks to his own uſe.

Lord ELLENBOROUGH, however, ſaid, that the facts ſtated were not ſufficient evidence of a converſion to ſupport an action of trover. Although the defendant might have been guilty of a tort reſpecting the bricks, it did not appear that he was guilty of

the ſpecific tort mentioned in the declaration. The action was therefore miſconceived.

Plaintiff nonſuited.

Garrow and *Parnther* for the plaintiff.

Park for the defendant.

[Attornies, *Druce* and *Noy*.]

So trover will not lie againſt a common carrier for merely *loſing* goods entruſted to his care. Roſs *v.* Johnſon, 5 Burr. 2825. But evidence of his delivering them to a wrong perſon by *miſtake*, is ſufficient to maintain trover againſt him at the ſuit of the right owner. Youl *v.* Harbottle, Peak. N. P. Caſ. 49.

If one having a lien upon goods, when they are demanded of him, claims to retain them upon a different ground, making no mention of the lien, trover may be maintained againſt him, without evidence of any tender having been made of the amount of his lien.

Boardman v. *Sill*, Sittings after M. T. 49 G. III. — Trover for ſome brandy, which lay in the defendant's cellars, and which when demanded he had refuſed to deliver up, ſaying it was his own property. At this time certain warehouſe rent was due to the defendant on account of the brandy, of which no tender had been made to him. The *Attorney General* contended that the defendant had a lien on the brandy for the warehouſe rent, and that till this was tendered trover would not lie. But Lord ELLENBOROUGH conſidered, that as the brandy had been detained on a different ground, and as no demand of warehouſe rent had been made, the defendant muſt be taken to have waived his lien, if he had one, — which would admit of ſome doubt.—The plaintiff had a verdict.

EDGAR

EDGAR *v.* BUMSTEAD.

Same day.

If an inſurance broker, when a loſs happens upon a policy which he has effected, pays the aſſured the full amount of the money ſubſcribed, he cannot recover back any part of it, upon the ground that before the loſs happened one of the underwriters upon the policy had become inſolvent, and that he was not aware of this fact when he paid the money.

ASSUMPSIT for money had and received, and on an account ſtated.—Plea, the general iſſue.

The principal item in diſpute between the parties was a ſum paid by the plaintiff to the defendant under the following circumſtances:

The plaintiff being an inſurance broker, got a policy under-written for the defendant, a merchant, on the ſhip Alfred, which was ſubſcribed (amongſt others) by one *Lomas*. A loſs happened; whereupon the plaintiff paid the full amount of the ſum inſured to the defendant. Previouſly to this, *Lomas* had become inſolvent, without the plaintiff being aware of that fact; and it was now contended that he had a right to recover the ſum he had paid to the defendant in reſpect of Lomas's ſubſcription, as money paid under a miſtake of fact.—But

Lord ELLENBOROUGH held, that on account of the well known courſe of dealing between the inſurance broker, the merchant, and the underwriter, the money could not, under theſe circumſtances, be recovered back from the aſſured.

Verdict for the defendant.

Garrow

Garrow and *Lawes* for the plaintiff.

Jervis and *Curwood* for the defendant.

[Attornies, *Boyd* and *Collins*.]

Vide Wilſon *v.* Creighton, 1 T. R. 112. — Dalzell *v.* Marſhall, 293.—Airy *v.* Bland, Mair, *poſt*.
Ib. 294. — Grove *v.* Dubois,

PHIPPS *v.* PARKER.

Monday, July 25.

If a deed purports to be executed by A. in the preſence of B. as atteſting witneſs; and B. ſwears truly that it was not executed by A. in his preſence. the deed cannot be proved by evidence of A's handwriting, or of an acknowledgment by A. that he had executed it.

THIS was an action for words. The declaration ſtated that the plaintiff had inſured his houſe from fire with the Sun Fire Inſurance Office; that his houſe was afterwards accidentally burnt down; and that the defendant, well knowing the premiſes, had ſaid that the plaintiff had wilfully ſet fire to it, with intent to defraud the Sun Fire Inſurance Office.

A policy was produced, having the names of two of the directors of the Sun Fire Office affixed to it, and purporting to be executed by them in the preſence of J. S. as atteſting witneſs. — J. S. being called to prove the execution of this policy, ſwore that it had not been executed in his preſence by either of the gentlemen whoſe names appeared at the bottom of it.

The *Attorney-General* for the plaintiff (without queſtioning the veracity of the witneſs) then propoſed to prove the execution of the policy by evidence of the

the hand writing of the directors who had ſigned it; and by ſhewing that they had ſubſequently acknowledged it to be their deed.

Lord ELLENBOROUGH.—The policy purports to have been executed in the preſence of the witneſs. I muſt therefore take it to have been executed in his preſence, if it was executed at all. If it was not executed in his preſence, the concluſion of law is, that it was never executed as a deed, although it may have been ſigned by theſe two directors. Nor can I admit evidence of their acknowledgement; ſince the atteſtation points out the ſpecific mode in which the execution is to be proved.

The *Attorney General* cited the caſe of *Jolliffe's will*, where all the atteſting witneſſes having denied that the will was duly executed, other witneſſes were admitted, who eſtabliſhed its validity (*a*).

Lord ELLENBOROUGH.—There the atteſting witneſſes had conſpired to defeat the will, and they were afterwards convicted of perjury (*b*). No imputation of that ſort is caſt upon this witneſs. There has been very great careleſſneſs both on his part and that of the Directors; but there is no reaſon to ſuſpect the teſtimony he now gives; or to believe that he was actually

(*a*) Lowe *v.* Jolliffe, 1 Bl. Rep. 365. The ſubſcribing witneſſes ſwore that the teſtator, at the time the will was made, was utterly incapable of making a will, or tranſacting any other buſineſs; but it was clearly proved, that he was then in the perfect poſſeſſion of all his faculties.

(*b*) Rex *v.* Nueys, 1 Bl. Rep. 416. They were ſentenced to ſtand twice in the pillory, with a paper on their heads denoting their crime.

preſent at the execution of the deed. Therefore, being iſſued as an atteſted deed, and now appearing certainly not to have been executed in the preſence of the atteſting witneſs, I think it muſt be conſidered as invalid.

Plaintiff nonſuited.

The *Attorney General* and *Eſpinaſſe* for the plaintiff.

Garrow and *Lawes* for the defendant.

[Attornies, *Evans* and *Collins.*]

In Faſſet *v.* Brown, Peak. N. P. Caſ. 23, Lord Kenyon held, that if the name of a *fictitious perſon* is put as a ſubſcribing witneſs to a deed, proof of the party's hand-writing is ſufficient evidence of its execution; and in Grellier *v.* Neale, *Ib.* 146, upon a ſubſcribing witneſs to a deed denying that ſhe had ſeen it executed, the ſame learned Judge admitted evidence of the hand-writing of ſeveral of the parties to it, and directed the jury to preſume the ſealing and delivery: but in the latter caſe the ſubſcribing witneſs had been requeſted to put her name to the deed by one of the parties who had ſigned it; which was a ſufficient atteſtation as to him, (Park *v.* Mears, 2 B. and P. 217); and the only point conſidered, ſeems to have been, whether bare proof of the hand-writing was ſufficient, or it was likewiſe neceſſary to prove a ſealing and delivery?—So rigidly has the rule been adhered to, that if there be a ſubſcribing witneſs to a deed, who is living and in a ſituation to be examined, the execution can only be proved by his teſtimony, that an acknowledgment of the party to the deed has been held inſufficient, whether offered as evidence againſt himſelf or againſt a third perſon; and even an admiſſion of the execution of a bond in an anſwer to a bill in chancery, filed for the expreſs purpoſe of obtaining ſuch admiſſion, was conſidered by the court of K. B. to be inſufficient, without proof that the ſubſcribing witneſs had been ſearched for, and could not be found. Johnſon *v.* Maſon, 1 Eſp. N. P. Caſ. 89. Laing *v.* Raine, 1 B. and P. 85. Call *v.* Dunning, 4 Eaſt, 53. Abbot *v.* Plumbe, Doug. 216.

GREGSON

GREGSON, GENT. ONE, &c. *v.* M'TAGGART, ESQ.

Wednesday, July 27.

THIS was an action for criminal converſation with the plaintiff's wife, *per quod conſortium amiſit.*

It is no bar to an action againſt A. for criminal converſation with the plaintiff's wife, that the plaintiff had brought another action of the ſame kind againſt B. and, having obtained a verdict and judgment, had charged B. in execution, although the cauſe of action in both ſuits accrued during the ſame period.

The plaintiff had brought a ſimilar action againſt one *Theaker*, his coachman, which was tried at the ſittings after laſt Hilary Term; and in which, having recovered 200*l.* damages, he afterwards entered up judgment, and took the defendant in execution.

The illicit intercourſe appeared to have been carried on by both defendants during the ſame period. But, though the former action was now alluded to by the defendant's counſel and by the court, it was not conſidered as any bar to the preſent.

The plaintiff had a verdict.

The *Attorney General*, *Garrow* and *Marryat* for the plaintiff.

Dallas and *Gurney* for the defendant.

[Attornies, *Gregſon* and *Crowder & Co.*]

There being evidence in *Gregſon v. Theaker*, that the plaintiff's wife had not been criminally connected with the defendant alone, Lord ELLENBOROUGH directed the jury to award damages proportioned barely to ſo much of the plaintiff's loſs of comfort as the defendant's miſconduct might be ſuppoſed to have occaſioned, not to the whole of the injury the plaintiff had ſuffered, which there ſeemed reaſon to ſuſpect might be imputed to others in a ſuperior condition of life, much more than to the *ſolicited coachman*. *Vide* Bird *v.* Randall, 3 Burr. 1345. 1 Bl. Rep. 373. S. C.

Same day.

BAYLEY AND OTHERS, ASSIGNEES OF PEARS, A BANKRUPT, *v.* BALLARD AND OTHERS.

A trader in contemplation of bankruptcy, and without solicitation, put three cheques into the hands of his clerk, to be delivered to a creditor at the counting house of the latter; but before they were delivered, the creditor called upon the trader, and demanded payment of his debt. Held, that the intention to give a voluntary preference not being consummated, this was a valid payment.

TROVER for three cheques for the sum of 1139*l.* 15*s.*

The case opened on the part of the plaintiffs was, that *Pears* in contemplation of bankruptcy had, without solicitation or legal process, paid these cheques to the defendants, and had thus given them *a voluntary preference.*

Pears carried on the business of a warehouseman and factor in this city, and the defendants were bill-brokers, with whom he had been in the habit of dealing. On Saturday the 10th October 1807, Pears being pressed for money to answer his acceptances, applied to the defendants for a loan; who accommodated him with the sum of 1400*l.*, to be repaid in a day or two, and received from him, by way of security, a bill on *Fisher and Atkinson* for 270*l.* 10*s.*, and another on *Hudson, Storr and Co.* for 1200*l.* On Tuesday the 13th *Pears*'s affairs became desperate, and he stopped payment. About three o'clock in the afternoon of the same day, he sent his clerk to the defendants' counting-house with the three cheques in question. The clerk delivered them accordingly, saying, "this is probably the last transaction we shall have together for some time: *we* are at a *stand-still.*" But, after the cheques had been put into the clerk's hands for the

the above purpoſe, and before they were delivered, a demand was made upon Pears at his counting-houſe by one of the defendants, for the repayment of the 1400*l.*; and on receiving the cheques, they gave up the bill upon *Hudſon, Storr and Co.* for 1200*l.*

Lord ELLENBOROUGH.—I am of opinion that this is not to be conſidered as a voluntary payment, one of the defendants having called at the bankrupt's before the cheques were delivered, although they had previouſly been put into the clerk's hands for that purpoſe. The intermediate demand takes it out of the caſes hitherto decided upon this ſubject. There was an intention of giving a voluntary preference; but that intention not having been conſummated, the payment ſtands good.

Plaintiffs nonſuited.

The *Attorney General*, *Garrow*, and *Marryat*, for the plaintiffs.

Park and *Walton* for the defendants.

[Attornies, *Crowder & Co.* and *Walton.*]

Vide Smith, *v.* Payne, 6 T. R. 152. Hartſhorn *v.* Slodden, 2 B. and P. 582. Thornton *v.* Hargreaves, 7 East, 544.

Thurſday, July 28.

FISHER *v.* OGLE.

The ſentence of a foreign court of admiralty is evidence only of what it poſitively and ſpecifically affirms in the adjudicative part of it,—not of what may be gathered from it by way of inference.

THIS was an action on a policy of inſurance on the ſhip Juno, *repreſented as American*, at and from London to the coaſt of Africa, during her ſtay and trade there, and from thence to her port or ports of diſcharge in the Weſt Indies.

The Juno was captured by a French privateer, carried into Martinique, and there condemned in the vice-admiralty court.

To falſify the repreſentation of neutrality, the defendant now gave in evidence the ſentence of condemnation. This ſtated, "that it reſulted evidently from the papers on board, that the expedition of the ſaid ſhip Juno, her cargo, and the operations of her captain on the coaſt of Africa, were for account of the Brothers *Geddes*, merchants of London, who had, to maſque the Engliſh property of this outfit, borrowed the American flag and paſſport of the ſaid ſhip Juno, and taken for their agent and partner in this expedition, Captain Fiſher, furniſhed with a certificate of citizen of the United States." The ſentence afterwards went on to declare *as good and valid prize* the ſlave ſhip Juno, and to confiſcate the ſaid ſhip and her cargo to the profit of her captors,—without ſtating any ſpecific grounds for the condemnation.

Lord

Lord ELLENBOROUGH.—We ſhew a ſufficient reſpect for French ſentences, if we attach credit in our courts to what they diſtinctly ſay. It is often painful to go this length, conſidering the piratical way in which they proceed. But this ſentence does not ſay that the ſhip was *not American*, and it is not to be conſidered as evidence of what it does not ſpecifically affirm. I dare ſay ſuch ſentences will be poſitive enough in future, ſince thoſe who frame them are diſpoſed to conſider every thing as good prize againſt all mankind. When they do ſpeak out, I will give them the ſame effect here which they receive in other places. But there is no proof in the preſent caſe that the property was not American, although ſuch an inference might be drawn from certain indirect ſtatements in the ſentence now preſented to us.

Verdict for the plaintiff.

In the enſuing term, *Park* moved for a rule to ſhew cauſe why there ſhould not be a new trial. He contended, that it neceſſarily reſulted from the terms of the ſentence of the French Admiralty Court, that the ſhip Juno and her cargo were not American, although this was not poſitively averred in any part of it; and that, according to the principle of former deciſions, the ſentence of a foreign court of competent juriſdiction muſt be taken as concluſive evidence of the facts upon which it evidently proceeds.

Lord ELLENBOROUGH.—I muſt look to the adjudicative part of the ſentence, and there I find nothing diſtinctly ſtated as to the ſhip or her cargo not being American. Have you any caſe in which it was held that Judges muſt fiſh for a meaning, when a ſentence of this kind is produced to them? Here the foreign court ſeems not to have formed any ſettled opinion upon the ſubject, and not to have known or cared on what grounds it proceeded to a condemnation. It is by an overſtrained comity that theſe ſentences are received as concluſive evidence of the facts which they poſitively aver and upon which they ſpecifically profeſs to be founded.

The other Judges were of the ſame opinion, and a rule *niſi* was refuſed.

The *Attorney General*, *Garrow* and *Scarlett* for the plaintiff.

Park, *Topping* and *Richardſon* for the defendant.

[Attornies, ——— and *Dennet*.]

Vide Bernardi v. Motteux, Doug. 574. Chriſtie v. Secretan, 8 T. R. 192. Pollard v. Bell, 8 T. R. 434. Saloucci v. Woodmaſs, Marſhall, 401. Kenderſley v. Chaſe, *Ib.* 423.

TOULMIN *v.* INGLIS.

Friday, July 29.

THIS was an action on a policy of insurance on goods on board the Adeona, at and from the Cape of Good Hope to Buenos Ayres, or any port or ports in the river Plate, and at and from thence back to the Cape of Good Hope, or to England.

The underwriters on a policy of insurance are not discharged by an act on the part of the assured, which to a certain degree encreases the risk, if it does not amount to culpable negligence. Therefore, where three Spanish prisoners of war were received on board a ship, and allowed the free range of it, who might have been reasonably expected to conduct themselves peaceably during the voyage, but who joined in a mutiny, and assisted to run away with the ship, the underwriters were held liable for a loss so happening.

The declaration stated the loss to have happened by ten of the mariners belonging to the ship having barratrously obtained the command of her and run her ashore.

The defence was, that the underwriters were discharged by the careless and negligent conduct of William Hopley, one of the assured, in taking on board three Spanish prisoners, who had stirred up the mutiny which terminated in the loss of the ship.

A short time before the Adeona was to set sail, three Spaniards at the Cape of Good Hope upon their *parole*, with the concurrence of Hopley, presented a memorial to Sir David Baird, the Governor, praying for liberty to return to their relations and friends at Buenos Ayres by this vessel. The following answer was returned :— "The memorialists may proceed in Mr. Hopley's vessel; but they must still be considered as prisoners of war, and deliver themselves over to Major-General Beresford, to be exchanged for any British Officers who may chance to be taken." The Spaniards were

accordingly conveyed on board by Hopley, who went as ſupercargo. No intimation was given to the Captain that they were priſoners of war; ſo that neither their perſons nor their baggage were examined, and they were allowed the full range of the ſhip. The reſt of the crew conſiſted chiefly of foreigners. The Spaniards had been at liberty at the Cape, and behaved in a manner to diſarm all ſuſpicion, till the mutiny broke out. This happened as the ſhip was going up the river Plate. The Spaniards were at the time ſuſpected to be at the bottom of the plot, but they did not take a more active part in it than others who joined them; among whom were four Engliſhmen.

Lord ELLENBOROUGH.—The queſtion is, whether there has been here groſs negligence in taking on board the three Spaniards? Did they materially enhance the riſk? Every foreigner is more dangerous than a Britiſh ſubject; but it is not contended that the underwriters are diſcharged becauſe the crew conſiſted in a great meaſure of foreigners. It is impoſſible to ſay that every thing which encreaſes the riſk vacates the inſurance; or this effect would be produced by taking on board a caſk of gunpowder, or any other inflammable matter. Theſe Spaniards were not conſidered as dangerous at the Cape, where they were allowed to walk about at large, and they were not ordered to be tranſported by this ſhip, but were permitted, at their own requeſt, to return home; where they were to *deliver themſelves up* to be exchanged for any Britiſh Officers who, by the fortune of war, might have fallen into the hands of the enemy. It might reaſonably have been conceived, that it was unneceſſary,

under

under theſe circumſtances, to keep them in jealous cuſtody, and that they might ſafely be conſtituted the guardians of their own honour. If there was no culpable inattention in taking them on board, and nothing aroſe afterwards to excite ſuſpicion of their intentions, the underwriters remain liable.

Verdict for the plaintiff.

The *Attorney General* and *Taddy* for the plaintiff,

Park, *Marryat* and *Carr* for the defendant,

[Attornies, *Winter & Co.* and *Gregg & Co.*]

Vide Pipon v. Cope, *poſtea*.

LYON *v.* SUNDIUS AND SHERIFF. Friday, July 29.

THIS was an action by the indorſee againſt the acceptor of a bill of exchange. The declaration ſtated generally, that the defendants accepted the bill according to the uſage and cuſtom of merchants.

If a bill of exchange is accepted *payable at a particular place*, in an action against the acceptor, this addition to the acceptance does not require to be noticed in the declaration, being no part of the contract, but merely a memorandum, where payment may be demanded.

The bill, when put in, appeared to be accepted by Sheriff for himſelf and his partner, "*payable at Meſſrs. Hankey and Co.'s London.*"

Park,

Park, for the defendants, objected that this was a ſpecial acceptance, and ought to have been declared upon accordingly. The undertaking to pay at the Bankers was clearly a part of the contract. Perhaps the holder might have inſiſted upon a general acceptance, or have proteſted the bill and proceeded againſt the drawer; but having reſted ſatisfied with the limited promiſe to pay at a particular place, he could not afterwards extend it. He was bound to preſent this bill at Hankey and Co.'s, where it was made payable; otherwiſe the acceptor, having provided ample funds to ſatisfy it there, might be arreſted for it on the Royal Exchange.

Lord ELLENBOROUGH.—How can you make the words, "*at Hankey and Co.'s*", more than a mere memorandum?—The acceptor of a bill of exchange is liable univerſally. This very point was brought before the court ſome time ago, when the Judges were all of opinion, that ſuch words formed no part of the contract and did not require to be ſet out in the declaration.

Park ſaid, he had an impreſſion upon his mind of ſuch a caſe having been decided; but not being able to find it in print, he thought it his duty to preſent a point of ſuch importance once more to his Lordſhip's conſideration.

Verdict for the plaintiff.

The *Attorney General* and *Taddy* for the plaintiff.

Park for the defendants.

[Attornies, *Winter* and Co. and *Allen*.]

&c

So if a promiſſory note is made payable at a particular place, in an action againſt the maker, there is no neceſſity for proving that it was preſented there for payment. *Per* BAYLEY, J. *Wild v. Rennards*, Sittings in H. T. 1809.—But it has been held, that if a bill be accepted, payable at a banker's, the party taking ſuch ſpecial acceptance is bound, *for the purpoſe of charging the drawer*, to preſent it for payment at the banker's, within the uſual banking hours of the place where the banker reſides. Parker *v.* Gordon, 7 Eaſt, 385. *Vide* Saunderſon *v.* Judge, 2 H. Bl. 509.

The holder of a bill of exchange may inſiſt upon the drawee accepting it, generally, in the very words in which it is drawn, or may proteſt it for non-acceptance. *Boehm v. Garcias and others*. Sittings after M. T. 47 G. 3.—Action on a bill drawn on Liſbon, "payable in *effectivè* and not in *vals reals*." The defendant was the drawer of the bill; and the queſtion was, whether it had been diſhonoured for non-acceptance? The drawees offered to accept it, payable in *vals denaros*, another ſort of currency, which was refuſed.—The defendant now propoſed to ſhew, that *vals denaros* was ſufficient to anſwer what was meant by *effectivè*. But,

Per Lord ELLENBOROUGH.—The plaintiff had a right to refuſe this acceptance. The drawee of a bill has no right to vary the acceptance from the terms of the bill, unleſs they be unambiguouſly and unequivocally the ſame. Therefore, without conſidering whether a payment in *denaros* might not have ſatisfied the term *effectivè*, an acceptance to pay in *denaros* was not a ſufficient acceptance of a bill drawn payable in *effectivè*. The drawees ought to have accepted generally, and an action being brought againſt them on the general acceptance, the queſtion would properly have ariſen as to the meaning of the term.—*Vide* 7 Eaſt, 387.

If a bill of exchange is ſent for acceptance to the drawee, and he retains it in his poſſeſſion, contrary to the uſual mode of dealing between himſelf and the holder, this amounts to an acceptance. *Harvey v. Martin*. Sittings after M. T. 47 G. 3.—Action on bill of exchange, by payee againſt acceptor. Plaintiff tranſmitted the bill by poſt to defendant, the drawee, as ſoon as he received it, deſiring him to accept and hand it over to plaintiff's agent in London, which was the uſual mode of dealing between the parties. Plaintiff hearing nothing of his bill from his agent, wrote to defendant,

fendant, remonstrating with him for the delay. The defendant answered, that he had retained the bill because he had once meant to accept it, which he now declined doing.

Lord ELLENBOROUGH.—This is clearly an acceptance. If a bill is left for the express purpose of being accepted, and is retained by the drawee, such retention is as much an acceptance as if he had written his name upon the face of it.—*Vide* Bentinck *v.* Dorrien, 6 East, 199. Thornton *v.* Dick, 4 Esp. Cas. 270.

But, by the usage of trade in London, a cheque may be retained by the banker on whom it is drawn, till five in the afternoon of the day on which it is presented for payment, and then returned, although it has previously been cancelled by mistake. —*Fernandey v. Glynn.* London Sittings after M. T. 47 G. 3.—Plaintiff paid into the house of Vere and Co. a cheque upon defendant's house. Vere's clerk took it to the clearing house to be paid, and put it into defendant's drawer. Each banker has a drawer there for that purpose. The time for putting in the cheques, is from three to four. Vere's clerk received it back before five, cancelled, with a memorandum written under it, "*Cancelled by mistake.*" After five, he would not have taken it back. The course was proved to be, for the clerks to take the cheques from the drawers, and send them to the respective bankers; and those which they will not pay, they send back before five. They are sometimes cancelled when they come in; but, by the custom, they may be returned any time before five o'clock. In this case, several cheques of the same person had been paid on that day, and when the cheque in question was sent in, the clerk who received it immediately cancelled it, believing it was to be paid; but finding in a few minutes, that no more of those cheques were to be paid, he wrote the memorandum under it, and it was returned as above mentioned.

Lord ELLENBOROUGH held, that notwithstanding the cancelling, defendant had till five o'clock to return the bill, and having so returned it, this amounted to a refusal to pay; though, had it been a bill sent for acceptance, and accepted, no change of circumstances could have altered that fact. *Vide* Stra. 415, 6.

PAYNE-

PAYNE *v.* SHADBOLT.

Same day.

THIS was an action of aſſumpſit for the non-delivery of wood purchaſed by the plaintiff from the defendant.

It is not an entire waiver of a condition to be paid for goods on *delivery*, that the vendor allowed the purchaſer to carry away a part of the goods without being paid for them.

It appeared that the wood had been ſold, to be paid for on delivery by a bill at two months; that the defendant had permitted the plaintiff to carry away a part of it, without receiving any bill; but that he had refuſed to let him have the remainder, till it ſhould be paid for according to the terms of the contract.

It was now contended on the part of the plaintiff, that the defendant had completely diſpenſed with the condition of being paid by a bill at two months, and that having waived it once, the property of the whole of the wood abſolutely veſted in the purchaſer; ſo that the vendor was bound to deliver it up, and to ſeek for payment by the common means. But

Lord ELLENBOROUGH held, that this was only a diſpenſation *pro tanto*, and that the vendor was entitled at any time to ſtand on his rights as they were originally eſtabliſhed by the contract of ſale.

Plaintiff nonſuited.

Garrow

Garrow and *Knox* for the plaintiff.

Park and *Eſpinaſſe* for the defendant.

[Attornies, *Harding* and *Blake.*]

Vide Dumpor's caſe, 4 Co. 119. b.—Hanſon *v.* Meyer, 6 Eaſt, 614.

Same day.

MILLEN, SPINSTER, *v.* WHITTENBURY.

Bankruptcy is not a diſcharge of a promiſe to allow a weekly ſum for the ſupport of an illegitimate child.

ASSUMPSIT on a promiſe to pay plaintiff half a guinea a week for the ſupport of an illegitimate child ſhe had had by the defendant.—Pleas, *non-aſſumpſit*, and *bankruptcy*.

Scarlett contended, that the defendant's certificate was a bar to the action, not only as to the previous arrears, but as to ſuch as were ſuppoſed to have ſubſequently become due. By law, a man was not bound to ſupport his illegitimate child without an order of filiation; ſo that here there could be no implied promiſe to maintain the action, and the expreſs promiſe was diſcharged by the defendant's bankruptcy.

Lord ELLENBOROUGH.—If any arrears accrued before the bankruptcy, the certificate will be a diſcharge as to theſe; for the plaintiff might have proved them under the commiſſion: but, could ſhe have ſet an aggregate value upon the defendant's promiſe to

to allow her a weekly ſum for the maintenance of the child, and received a dividend for that?—As no proof in reſpect of the ſubſequent arrears would have been admitted under the commiſſion, I am of opinion, that the defendant is ſtill liable for them in this action.

Verdict for the plaintiff.

Garrow and *Comyn* for the plaintiff.

Scarlett for the defendant.

[Attornies, *Crook* and *Caton*.]

Vide Auriol *v.* Mills, 1 H. Bl. 433. 4 T. R. 94. S. C. Boot *v.* Wilſon, 8 Eaſt, 311. Wadham *v.* Marlowe, *Ib.* 314.

DONALDSON *v.* THOMPSON.

Saturday, July 30.

THIS was an action on a policy of inſurance on the American ſhip Maryland Mary, at and from Gibraltar to a market, with leave to call and land goods at two or more ports in the Mediterranean.

The ſentence of a court of admiralty, ſitting under a commiſſion from a belligerent power, in a neutral country, will not be recognized in our courts; and that is to be conſidered a neutral country for this purpoſe, in which the forms of an independent neutral government are preſerved, although the belligerent may have ſuch a body of troops ſtationed there, as in reality to poſſeſs the ſovereign authority.

The ſhip having landed ſome goods at Malta, proceeded from thence on the 17th of May 1807, with the reſt of her cargo for Smyrna, but was the ſame day captured by a Ruſſian privateer, and being afterwards carried into Corfu, was there condemned as lawful prize.

The defence ſet up by the underwriters was, that this American ſhip, by ſailing for Smyrna, had violated the laws of neutrality; as that port was then blockaded by the Ruſſians. However, the only evidence adduced to ſhew that the Captain knew of the blockade before he left Malta, was the *ſentence of condemnation*, in which this fact was poſitively averred. Upon the validity of this ſentence, therefore, the cauſe entirely depended. It was pronounced by a prize commiſſion which ſat at Corfu in July 1807, by the authority of the Emperor of Ruſſia.

The plaintiff's counſel contended, on the authority of the caſe of the *Flad Oyen*, 1 Rob. Rep. 144, that the ſuppoſed court could have no legitimate juriſdiction where it ſat, and that its ſentence was a nullity. Corfu was one of the iſlands which formed the Ionian Republic,—an independent government recognized by the peace of Amiens, and which continued to preſerve its neutrality amidſt the ſtruggles of the ſurrounding ſtates. A belligerent, therefore, could have no right to hold a prize court there, conſiſtently with the principles of the law of nations.

On the other ſide, it was admitted, that if Corfu was to be conſidered as being, at the time of the condemnation,

demnation, an independent neutral ſtate, the ſentence could not be ſupported. But they undertook to prove that it was ſubſtantially part of the territory of the Ruſſian empire; and they inſiſted that this muſt be taken to be the caſe, if the Ruſſian power was there dominant—if the ſupreme authority was veſted in the Ruſſian commander; although there might ſtill be kept up ſome empty forms of an imaginary republic.

The condition of Corfu, in July 1807, was deſcribed by a gentleman who had acted there as Engliſh Conſul. He ſtated, that at that time, there was a Ruſſian garriſon in Corfu, and the Ruſſians had about 6000 men in the different iſlands of the republic; that they had made Corfu a military ſtation for four or five years; and that they continued in poſſeſſion of it till the peace of Tilſit, when they delivered it up to Bonaparte: but, that previouſly to that event, the flag of the Ionian Republic flew from the forts in the iſland; there was a port Admiral appointed by the Ionian Republic; a Conſul from the Sublime Porte reſided at Corfu, and the witneſs was recognized as Engliſh Conſul by the Prince and Senate of the Ionian Republic, who continued in their functions till the republican government was diſſolved by the French.

Lord ELLENBOROUGH.—I will not receive the ſentence. Under theſe circumſtances, the Ruſſians muſt be conſidered as viſitors in Corfu, and not as ſovereigns. While a government ſubſiſts as this did, we cannot look to the degree in which it might be overawed by a foreign force. The ſentence was pronounced by a belligerent on neutral territory, and is

therefore void. I am by no means diſpoſed to extend the comity which has been ſhewn to theſe ſentences of foreign admiralty courts. I ſhall die, like Lord Thurlow, in the belief that they ought never to have been admitted. The doctrine in their favour reſts upon an authority in Shower (*a*), which does not fully ſupport it; and the practice of receiving them often leads in its conſequences to the greateſt injuſtice.

Verdict for the plaintiff.

In the enſuing term, *Park* applied to the court to ſet aſide this verdict, on the ground that the ſentence of the Ruſſian prize court had been improperly rejected. He contended that Corfu, when occupied in the manner above deſcribed by the Ruſſian troops, was either to be conſidered as a part of the Ruſſian empire, or as a co-belligerent with Ruſſia againſt the Porte, ſince the Emperor of Ruſſia derived the ſame advantages in a military point of view from this occupation of the iſland, as if he had ſeized it hoſtilely, or the Ionian Republic had been his ally in the war he was carrying on. A rule *niſi* was reluctantly granted: but, cauſe being ſhewn, it was diſcharged.

Lord ELLENBOROUGH.—It is impoſſible to ſay that the government of the Ionian Republic was ſuperſeded, at a time when its inſtitutions ſubſiſted, and its ſupremacy was recognized. How, then, was Corfu a

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(*a*) Hughes v. Cornelius, 2 Show. 232.

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co-belligerent?—Only becauſe it endured an hoſtile aggreſſion. Will any one contend that a government which is obliged to yield in any quarter to a ſuperior force, becomes a co-belligerent with the power to which it yields? It may as well be contended, that *neutral* and *belligerent* mean the ſame thing. Indeed, this principle would make us co-belligerents with France, becauſe we receded from Corunna.

The *Attorney General*, *Garrow* and *Puller* for the plaintiff.

Park, *Topping* and *Scarlett* for the defendant.

[Attornies, *Crowder* and *Blunt*.]

In Smith *v.* Surridge, 4 Eſp. N. P. Caſ. 26, Lord Kenyon is ſtated to have held, that the ſentence of a court of admiralty, ſitting under a commiſſion from a belligerent in a neutral country, is valid, *if acquieſced in by the government of the neutral country*; but this doctrine is not only contrary to the caſe of the *Flad Oyen*, and other deciſions of Sir William Scott, but is inconſiſtent with what was laid down by Lord Kenyon himſelf 8 T. R. 276, where the foreign ſentence which was rejected, had been pronounced at the ſame place and under the ſame circumſtances as that ſuppoſed to have been recognized in Smith *v.* Surridge. —In France, no ſentences of foreign courts, of whatſoever deſcription they may be, were received as evidence in ſuits in which Frenchmen were parties, Emerigon, tom. 1. p. 458.

Same day.

PIPON *v.* COPE.

If through the negligence of the owner of a ſhip inſured, the mariners baratrouſly carry ſmuggled goods on board, whereby the ſhip is ſeized as forfeited, the underwriters are not liable for the loſs.

If a ſhip is juſtly ſeized as forfeited for ſmuggling, and afterwards reſtored, the underwriters are not liable for any damage happening to the ſhip by the perils of the ſea, in the interval between the ſeizure and reſtoration.

THIS was an action on a policy of inſurance on the ſhip General Doyle, for 12 months from the 15th day of October, 1806, warranted "*free from captures and ſeizures and the conſequences of any attempt thereof.*" —The declaration ſtated ſeveral average loſſes to have accrued upon the ſhip during that period, by the barratry of the mariners and by the perils of the ſea.

The General Doyle was employed as a poſt-office packet, between Weymouth, and Guernſey and Jerſey. Government indemnified the owner againſt capture or damage by the enemy, and his object was to cover all other riſks by the preſent policy.

The acts of barratry relied upon were conſtituted by the taking of ſmuggled goods on board the ſhip. Upon her return to Weymouth ſoon after the policy was affected, conſiderable quantities of ſpirits and tobacco were found concealed in different parts of her, which had been placed there by the ſailors, without the knowledge of the plaintiff. She was ſeized in conſequence; but was afterwards liberated, on ſatiſfaction being made to the ſeizing officers. She again ſailed with a freſh crew, who were admoniſhed to beware of any infraction of the revenue laws. Notwithſtanding this, they took large parcels of ſalt on board at Jerſey, which being afterwards diſcovered, the veſſel was ſeized a ſecond time. However, ſhe was releaſed

as

as before, and made another trip. As ſoon as ſhe returned, ſhe was ſeized a third time for having ſpirits and tobacco on board, which had been ſecretly ſtowed away by the mariners. While ſhe lay under ſeizure on this occaſion in Weymouth harbour, another ſhip was driven againſt her by the force of the tide, and did her conſiderable damage. A petition to the board of Cuſtoms was in the mean time preſented by the plaintiff, ſtating his entire ignorance of theſe ſmuggling tranſactions; and the ſhip was once more reſtored to him on the uſual terms. His demand againſt the underwriters was made up of the ſums given to procure theſe reſtitutions, and the ſum laid out in repairing the veſſel from the damage ſhe had ſuſtained.

The *Attorney General* contended, that the underwriters were liable for all theſe loſſes, notwithſtanding the warranty. That only extended to captures and ſeizures by the enemy, againſt which the plaintiff had no occaſion to inſure, being indemnified by government. The ſums paid to the revenue officers were a neceſſary effect of the barratry of the mariners, in carrying ſmuggled goods on board without the privity of the owner. Theſe payments were in truth greatly for the benefit of the underwriters, as the ſhip had been completely forfeited, and they might have been called upon for a total loſs. With reſpect to the repairs, there could not be the ſmalleſt doubt; as this loſs was not occaſioned by any *capture* or *ſeizure* of any ſort, but aroſe from a common ſea riſk, for which the defendant had become anſwerable.

Lord ELLENBOROUGH.—I can conceive, that as by *captures* in the warranty, *hoſtile captures* are evidently meant, ſo by "ſeizures," muſt be underſtood ſeizures *ejuſdem generis*. But this is a clear caſe of *craſſa negligentia* on the part of the aſſured. It was the plaintiff's duty to have prevented theſe repeated acts of ſmuggling by the crew. By his neglecting to do ſo, and allowing the riſk to be ſo monſtrouſly enhanced, the underwriters are diſcharged.—Nor can he recover for the repairs. The ſhip being under ſeizure when ſhe was run foul of, he had then ceaſed to have any property in her. If a veſſel is ſeized *pro juſtâ cauſâ*, the property is immediately veſted in the crown. This is different from Lord Keith's caſe, where the ſhip had been *unjuſtly* ſeized, and the property was not conſidered to have been deveſted from the owner (*a*). Here giving back the ſhip was an indulgence, and after ſuch continued negligence on the part of the plaintiff, rather an extraordinary one.

Plaintiff nonſuited.

The *Attorney General* and *Marryat* for the plaintiff.

Garrow and *Park* for the defendant.

[Attornies, *Crowder & Co.* and *Winter & Co.*]

(*a*) Collet *v.* Lord Keith, 2 Eaſt, 260.

The ſupineſs of the plaintiff in this caſe may be conſidered as a breach of an implied warranty on the part of the aſſured, to uſe reaſonable care and diligence to guard againſt all the riſks covered by the policy.—*Vide* Law *v.* Hollingſworth, 7 T. R. 160.

CROWDER

CROWDER AND OTHERS *v.* SHEE.

Same day.

ASSUMPSIT on an attorney's bill, and for money paid, &c.—Plea, *the general iſſue.*

An action having been brought on a policy of inſurance which the defendant had ſubſcribed, he deſired the plaintiffs, Meſſrs. Crowder, Lavie, and Co. to do for him as for the other underwriters, and the ſum of money now ſought to be recovered was repreſented as his proportion of the law expences which had been incurred in the courſe of that ſuit. No bill ſigned by the Plaintiff's had been left with the defendant according to the proviſions of ſtat. 2 G. II. c. 23. but a witneſs ſwore that when the demand was made upon the defendant, he was ſhewn a copy of the bill, the different charges were explained to him, and he ſaid to his brother, to whom he left the management of the buſineſs, "*Why do you not fill up a cheque for the money?*" — One Part of the plaintiffs' demand, ſuppoſed to ſtand on peculiar grounds, was for the ſum of 8*l.* which they had paid as the defendant's proportion of certain coſts awarded by the court to the aſſured.

Although an attorney ſhews his client a copy of his bill, explaining the different charges to him, in the reaſonableneſs of which the client acquieſces, the attorney is ſtill bound to leave a copy of the bill with him, according to the proviſions of ſtat. 2 G. II. c. 23. before he can maintain an action upon it. But where ſeveral are jointly liable to an attorney for buſineſs done, the delivery of a copy of the bill to one of them is ſufficient to maintain a ſeparate action againſt any of the others. Money paid by an attorney for coſts which his client is adjudged to pay is a diſburſement within 2 G. II. c. 23.

Marryat, for the defendant, ſaid he was inſtructed to rely upon the objection of no bill having been regularly delivered.

Garrow

Garrow, on the other ſide, contended, that notwithſtanding this omiſſion, the whole ſum demanded was recoverable; as the defendant had waived his right to have a bill left with him a month before the commencement of the action. He had been fully informed of the nature of the charges, and had in ſubſtance acknowledged that his proportion of them amounted to the ſum he was required to pay. Thus he had enjoyed all the benefit of the act of parliament; and the truth was, that it would be a moſt oppreſſive practice to the underwriters themſelves if a bill of coſts and diſburſements were made out for each of them; as they would be bound to pay for it, and the expence would often be far greater than the ſum for which they had underwritten the policy. — At any rate the 8*l.* was clearly recoverable as money paid to the defendant's uſe.

Lord ELLENBOROUGH.—If the objection is taken I muſt give it effect. The act of Parliament is imperative. No attorney can commence an action until the expiration of one month after delivering to the party or parties to be charged a bill of his fees, charges and diſburſements, ſigned with his proper hand. I don't think it neceſſary that ſuch a bill ſhould be delivered to each of the parties; and here if it can be ſhewn that a bill was regularly delivered to any one of the underwriters who were jointly liable, I ſhall repel the objection ſtarted on the part of the defendant. But if there was not, I think the plaintiffs cannot recover even for the 8*l.* I cannot ſeparate that from the other items in the bill. I think the plaintiffs as to that were ſtill acting as the defendant's attornies,

attornies, and that it muſt be conſidered as a diſburſement in the cauſe.

Plaintiffs nonſuited.

Garrow and *Puller* for the plaintiffs.

Marryat for the defendant.

[Attornies, *Crowder & Co.* and *Addis*]

The intention of 2 G. II. c. 23 § 23. is ſaid to be to give the client due time to examine the charges made by the attorney and *to take advice upon them*, ſo that the bill ſhould be left with him for that purpoſe. — Brooks *v.* Maſon, 1 H. Bl 290. A diſtinction has been taken upon the point, whether an attorney may recover for diſburſements not taxable, when part of his demand is for buſineſs done in court, viz. that he may, where he has delivered no bill at all, Peak. Caſ. 102. 2 B. & P. 345; — but that where he has delivered a bill irregularly, he cannot. 6 T. R. 645. 2 B. & P. 343.

SMITH, ASSIGNEE OF TENANT, A BANKRUPT, *v.* YOUNG.

Tueſday, Nov. 1.

TROVER for a leaſe aſſigned by the bankrupt to the defendant after an act of bankruptcy.

If a verbal demand and a demand in writing are made at the ſame time, for the purpoſe of bringing an action of trover, and the one has no reference to the other, evidence of the verbal demand is ſufficient, without the production of the writing.

In trover for a deed, the evidence of converſion was, that when the deed was demanded from the defendant, he ſaid, he would not deliver it up, but that it was then in the hands of his attorney, who had a lien upon it. This held inſufficient.

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The witneſs to prove the *demand*, ſtated, that he had verbally required the defendant to deliver up the leaſe, and at the ſame time ſerved upon him a notice in writing to the like effect.

Lord ELLENBOROUGH aſked if the words ſpoken upon this occaſion were ſufficient to convey to the defendant's mind the demand and the terms of it, without reference to the paper writing? — The witneſs anſwered in the affirmative.

The *Attorney General*, for the defendant, nevertheleſs inſiſted, that according to the common rule the writing ought to be produced, as that could be much more relied upon for the terms of the demand than the frail memory of the witneſs.

Lord ELLENBOROUGH.—I may do an act of this ſort doubly. I may make a demand in words and a demand in writing; and both being perfect, either may be proved as evidence of the converſion. If the verbal demand had any reference to the writing, to be ſure the writing muſt be produced; but if they were concurrent and independent, I do not ſee how adding the latter could ſuperſede the former, or vary the mode of proving it.

When the leaſe was demanded the defendant ſaid, "he would not deliver it up; but it was then in the hands of his attorney, who had a lien upon it for a ſmall ſum of money due to him."

Garrow,

Garrow, for the plaintiff, contended that the attorney's poſſeſſion of the leaſe was in law the poſſeſſion of the defendant, who muſt be conſidered as having a complete controul over it, and that the lien did not, under theſe circumſtances, prevent the refuſal to deliver up the deed from amounting to a converſion.

Lord ELLENBOROUGH.—The defendant would have been guilty of a converſion if it had been in his power; but the intention is not enough. There muſt be an actual *tort*. To make a demand and refuſal ſufficient evidence of a converſion, the party when he refuſes muſt have it in his power to deliver up or to detain the article demanded.

Plaintiff nonſuited.

Garrow, Park and *Scarlett* for the plaintiff.

The *Attorney General Marryat* and *Eſpinaſſe* for the defendant.

[Attornies, *Palmer & Co.* and *Holmes.*]

Vide Bul. N. P. 44. — M'Combie *v.* Davies, 6 Eaſt, 538, 7 Eaſt, 5. — *Q.* If the defendant had ſaid *he had delivered the deed to his attorney*, would this have amounted to evidence of a converſion?

VINCENT

Wednesday, Nov. 2.

VINCENT AND OTHERS *v.* HORLOCK AND OTHERS.

If A., the payee of a bill of exchange, indorses it in blank, and delivers it to B., and B. writes above A's indorsement "*pay the contents to C.*," B. is not liable to C. as an indorser of the bill.

THIS was an action brought pursuant to an order of the Lord Chancellor, against the defendants as indorsers of a bill of exchange for 950*l.*, dated 25th February 1793. The declaration stated the bill to have been drawn by one Jacks, payable to his own order, and to have been indorsed by him to the defendants, and by the defendants to the plaintiffs.

The fact was, that Jacks, the drawer and payee of the bill, indorsed it in blank to Horlock and Co., and that Caleb Jones, one of the partners in that house, wrote over Jacks's signature, "Pay the contents to Vincent and Co.," without signing his own name or that of his firm.

Park, for the plaintiffs, contended that this was an indorsement by the defendants which rendered them liable on the bill. An indorsement was like an acceptance (*a*), and did not require to be according to any set form. Any words written upon the bill which expressed the intention of the party to transfer it, were sufficient, without his name being subjoined. The suit out of which this action sprung, had been depending ten years in Chancery, during all which time it had never once been doubted in that

(*a*) *Vide* Mason *v.* Rumsey, *ante* 385.

court

court that this on the face of it was a valid indorſement by the defendants; and the Lord Chancellor had ſent the cauſe here for the inveſtigation of a perfectly different queſtion.

Lord ELLENBOROUGH.—I am clearly of opinion that this is not an indorſement by the defendants. For ſuch a purpoſe the name of the party muſt appear written with intent to indorſe. We ſee theſe words "*Pay the contents to ſuch a one*" written over a blank indorſement every day, without any thought of contracting an obligation; and no obligation is thereby contracted. When a bill is indorſed by the payee in blank, a power is given to the indorſee of ſpecially appointing the payment to be made to a particular individual, and what he does in the exerciſe of this power is only *expreſſio eorum quæ tacite inſunt*. This is a ſufficient indorſement *to the plaintiffs*, but not *by the defendants*. The point could never have been preſented to the attention of the Lord Chancellor.

Plaintiff nonſuited.

Park and *Wigley* for the plaintiffs.

The *Attorney General* and *Abbot* for the defendants.

[Attornies, *Blagrave* and *Sandys*.]

"In the caſe of a bill of exchange, we know preciſely what remedy the holder has, if the bill be not paid; his ſecurity appears wholly on the face of the bill itſelf, the acceptor, the drawer, and the indorſers, are all liable in their turns; but they are only liable *becauſe they have written their names on the bill*."—*Per* BULLER, J. Fenn *v.* Harriſon, 3 T. R. 761.

Same day.

COATES AND ANOTHER *v.* LEWES AND ANOTHER.

If the owner of goods allows the broker through whom he ſells them, to ſell them as a principal, the purchaſer of goods ſo ſold is diſcharged by payment to the broker in any way which would have been ſufficient, had he been the real owner.

THIS was an action to recover the price of a quantity of linſeed oil ſold by the plaintiffs to the defendants,—who contended that they had already paid for it.

The witneſs to prove the ſale, ſtated, that the oil was conſigned to him by the plaintiffs from an outport to be ſold in London; that he ſold it to the defendants, to be paid for on delivery; that he appeared in the tranſaction as a principal; that he had formerly had goods conſigned to him by the plaintiffs, who knew that he always dealt in the ſame manner; and that after the ſale in queſtion, but before the oil was delivered, he had received 500*l.* from the defendants on account of it for his own accommodation.

Lord ELLENBOROUGH.—A *broker* after having made the contract of ſale cannot vary the terms of it to the diſadvantage of his principal; but in this caſe the perſon employed to ſell, himſelf acted as a *principal*, and the plaintiffs knowing this, authorized his mode of dealing, and all its conſequences.

It was then ſuggeſted that the defendants muſt have known he was not acting on his own account, as they knew him to be a ſworn broker of the city of London.—But

Lord ELLENBOROUGH ſaid a breach of his duties in that capacity could not affect the rights of third perſons.

Plaintiff nonſuited.

The *Attorney General*, *Park* and *Parnther* for the plaintiffs.

Garrow and *Bolland* for the defendants.

[Attornies, *Druce* and *Wiltſhire*.]

Vide Waring *v.* Favenck, *ante*, 85.—Kymer *v.* Suwercropp, *ante* 109, 180. c.—Wiltſhire *v.* Sims, *ante* 258.

BROOKE *q. t. v.* MIDDLETON.

Thurſday, November 3.

DEBT on 12 Ann. ſt. 2. c. 16. to recover penalties for uſury.—The 5th count ſtated, that defendant on the 5th of November 1807, took 16*l.* 1*s.* above the rate of 5 per cent. per annum for forbearing to W. and L. payment by them to him of 997*l.* 14*s.* 6*d.* from the 23d of June 1807, to the 5th of November following, *and of the ſum of* 242*l.* 7*s. from the* 20*th of April* 1807, *to the ſaid* 5*th of November*; ſuch ſums

Where money is lent by a cheque upon a banker, without a previous agreement to conſider the cheque as caſh, there is no loan or forbearance within the ſtatute of uſury, till caſh is actually received for the cheque. Therefore, in debt on 12 Ann. ſt. 2. c. 16. where the declaration ſtated, that the defendant forbore a ſum of money from the 20*th of April*, and it appeared, that having previouſly received at his reſidence in the country a bill to be diſcounted for a houſe in London, he, on the 20*th*, ſent off a letter for them by the poſt, incloſing caſh notes or cheques on London bankers for the ſum in queſtion, which did not reach London till the 21*ſt*,—this was held to be a fatal variance.

of 997*l.* 14*s.* 6*d.* and 242*l.* 7*s.* having been advanced by the defendant in the diſcount of a bill of exchange for 1289*l.* 14*s.* 8*d.*, dated 2d March 1807, payable eight months after date.

It appeared that Wilkins and Lacy, Blackwell-hall factors, reſiding in London, and the defendant, a great waggon owner at Frome in Somerſetſhire, had had various tranſactions together in the diſcounting of bills. About the middle of April 1807, W. and L. ſent the defendant a bill for 1289*l.* 14*s.* 8*d.*, due the 5th of November following, for the purpoſe of being diſcounted by him; and the defendant, by way of diſcounting it, on the 20th of April, put a letter into the poſt office at Frome, addreſſed to them, incloſing a draft on Williams & Co. for 997*l.* 14*s.* 6*d.*, due the 23d of June, and 242*l.* 7*s.* in paper of different ſorts, deſcribed as *caſh notes*. The only evidence given of the nature of theſe notes, was the enumeration of them in the defendant's letter in the following form:

Robarts & Co. L. 56 4
Hammerſley, 58 15—&c.

— A great number of other bankers were mentioned, with ſums of money againſt their names. The poſt mark ſhewed the defendant's letter to have reached London on the 21ſt of April. He afterwards came to a ſettlement with W. and L., when he took from them conſiderably more than legal intereſt, under colour of commiſſion. In the account which he then rendered them, he charged intereſt on the 242*l.* 7*s.* from the 20th of April.

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The *Attorney General*, for the defendant, objected, however, that the 242*l.* 7*s.* could not be ſaid to have been forborne from the 20th of April; as no part of it could have been received by Wilkins and Lacy before the 21ſt at the ſooneſt.

Garrow, on the other ſide maintained, that the defendant began to forbear the money from the moment that he parted with it. He himſelf had charged intereſt for it from that time; to which, had the tranſaction been legal, he certainly had a right. Suppoſe that a merchant at Glaſgow ſhould, by way of loan, ſend ſeveral bags of caſh to a houſe in London, the loan was ſurely complete as ſoon as he had delivered them to the carrier appointed to tranſport them, who was the borrowers' agent; and intereſt would accrue to the lender while the money was on its way to the metropolis. The caſh notes in queſtion were preciſely the ſame as caſh, and the ſum for which they were available was, therefore, forborne by the defendant from the 20th of April, when he remitted them by the poſt.

Lord ELLENBOROUGH.—For civil purpoſes, the loan might be complete on the 20th; but in a criminal proceeding, can we ſay that the defendant forbore the money from that day, when it was then uncertain whether it ever would be received? Suppoſe he has charged for what he never lent, he may be liable for a fraud, not for uſury. Perhaps he was not wrong in claiming intereſt from the 20th for commercial purpoſes; but before the forbearance begins which is to

ſubject a man to penalties for uſury, caſh notes advanced muſt have become available,—the money muſt have been graſped by the perſon to whom it is forborne. When I accommodate a man with a cheque upon my banker, there may be a loan for which intereſt is due. Till the money is actually received under it, there is no forbearance within the meaning of this ſtatute. I am quite clear that the plaintiff cannot recover upon the 5th count.

In ſupport of other counts, it was proved that the defendant, in diſcounting bills for W. and L. had charged a commiſſion of *7s. 6d.* per cent.; and no evidence was given of his being put to expence, or to any conſiderable degree of trouble in theſe tranſactions.

The CHIEF JUSTICE was of opinion, that they were uſurious; but the jury found a verdict for the defendant.

In the enſuing term, *Garrow* moved for a new trial, on the ground of a miſ-direction of the Judge on the 5th count. He again urged, that the loan of the 242*l.* 7*s.* took place to all purpoſes on the 20th of April. If Wilkins and Lacy had themſelves received the caſh notes at Frome on that day, it could not be doubted that the loan would then have been complete; and it could make no difference to the defendant that the notes were ſent them by the poſt. If it was neceſſary that caſh ſhould actually have been received before the forbearance began, it would be difficult to aſcertain, whether this was on the 21ſt, or on what

ſubſequent

ſubſequent day: but this could never be permitted to depend upon the borrower keeping them in his pocket, or preſenting them immediately for payment. Theſe notes were conſidered as caſh by both parties.—Where goods were given in diſcounting a bill, the law conſidered them as money; although *there* a more difficult operation was requiſite on the part of the borrower to convert what he received into caſh. [BAYLEY, J. It certainly has been held, that the delivery of goods in diſcounting bills of exchange, might be laid as a loan of money; but in that caſe, the party had previouſly agreed to take the goods as caſh (*a*). No ſuch agreement exiſted here.]—Bank of England notes were but ſecurities for money payable on demand in London, and they were conſidered in all commercial tranſactions as caſh even in diſtant parts of the country.

Lord ELLENBOROUGH.—From the information we have as to the nature of theſe *caſh notes*, we muſt conſider them cheques payable on demand; and I am ſtill of opinion that they did not conſtitute a loan till

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(*a*) The learned Judge probably alluded to Barbe, *q. t. v.* Parker, 1 H. Bl. 283. The declaration there ſtated, *that the defendant, on the 17th of May 1788, lent to S. R. the ſum of 86l. 9s. and forbore and gave day of payment of the ſame from thence*, &c. It appeared that this ſum was paid in money, bills, *and a gold tooth pick caſe*, but that S. R., purſuant to a previous agreement, took this trinket *as caſh*, and immediately melted it down. The court of C. P. held, that the declaration was proved, the contract having been for the loan of money, not the delivery of goods; and Lord Loughborough ſaid, that if any other commodity of leſs eaſy ſale had been ſubſtituted, the law would have been preciſely the ſame.

converted into caſh. They might have turned out to be worth nothing. Is there any caſe where an aſſignable authority to receive caſh, without any choice being given either to take this ſecurity or actual caſh, has been held to be a loan within the ſtatute of uſury? Here the borrower had no alternative.

GROSE, LE BLANC and BAYLEY, Js. were of the ſame opinion.

In a penal action, where there has been a verdict for the defendant, the court will not grant a new trial, except for a mildirection of the Judge.

Garrow then inſiſted, that the verdict on the other counts ought to be ſet aſide, as contrary to evidence. He allowed, that new trials were not to be granted readily in penal actions; but pointed out the dangerous conſequences which might ariſe from the doctrine, that there was no poſſibility of reviewing the verdict of a jury upon ſuch a ſubject.

The COURT ſeemed ſtrongly of opinion, that the tranſactions imputed to the defendant were uſurious; but, on being referred to *Fonereau* v. ——, 3 Wilſ. 59 (*a*), they ſaid they conſidered themſelves precluded from granting a new trial in penal actions, except for a miſ-direction of the Judge.—*Rule niſi refuſed.*

Garrow, *Jervis* and *Marryat* for the plaintiff.

The *Attorney General*, *Park* and *Lawes* for the defendant.

[Attornies, *Walton* and *Swain & Co.*]

(*a*) S. P. Jervois *q. t. v.* Allanſon, *Ib.* 1238. Hall. 1 Wilſ. 17. Seymour *q. t. v.* Day, Stra. 899. Mattiſon *q. t. v.* Wilſon v. Raſtall, 4 T. R. 758.

GOSLING

GOSLING *v.* HIGGINS.

Friday, Nov. 4

If goods put on board a ſhip to be carried from one place to another, are wrongfully ſeized by the officers of government, ſo that they cannot be delivered to the conſignee, the owner of the goods has an action for the non-delivery, againſt the owner of the ſhip, who muſt ſeek his remedy over againſt the officers of government.

THIS was an action for the non-delivery of 10 pipes of wine, ſhipped at the iſland of Madeira, on board a veſſel of which the defendant was owner, to be carried to Jamaica, and from thence to England.

When the veſſel arrived off Jamaica, ſhe was ſeized with her cargo for a ſuppoſed violation of the revenue laws, and there condemned; but upon an appeal to the Privy Council in England, the ſentence of condemnation was reverſed.

Garrow, for the defendant, likened this to the caſe of an embargo, for which the ſhip-owner could not be liable. Here the goods could not be delivered, by reaſon of an act of government; and even ſuppoſing that the revenue officers committed a tort when they ſeized the ſhip's cargo, that muſt be conſidered as a tort between them and the owner of the wine, not between them and the defendant.

Lord ELLENBOROUGH.—You have an action againſt the officers. The ſhipper can only look to the owner or the maſter of the ſhip.

Verdict for the plaintiff.

The *Attorney General* and *Lawes* for the plaintiff.

Garrow and *Marryat* for the defendant.

[Attornies, *Lamb* and *Rivington*.]

Vide Abbott on Shipping, Part III. Ch. IV.

Same day.

HURRY AND OTHERS *v.* MANGLES AND OTHERS.

If after goods are ſold, they remain in the warehouſe of the vendor, and he receives warehouſe rent for them, this amounts to a delivery of the goods to the purchaſer, ſo as to put an end to the vendor's right of ſtopping them *in tranſitu*.

TROVER for a quantity of oil.

The defendants, who are warehouſemen, on the 19th of April 1806, ſold the oil in queſtion, then lying in their warehouſes, to J. S., to be paid for by his acceptance at ſix months. J. S. having given his acceptance accordingly, on the 1ſt of Auguſt following, ſold the oil to the plaintiffs, who purchaſed it *bona fide*, and paid for it at the rate agreed on.

The oil, which ſtill remained in the defendants' poſſeſſion, was demanded of them by the plaintiffs about the end of October; when they ſaid that J. S. had become inſolvent before his acceptance was due, and that they would not deliver up the oil until they were paid for it. Their clerk now denied that they had ever transferred the oil in their books to the account of J. S.; but it appeared that they had received *warehouſe rent* from him for its remaining in their warehouſes after the period when it ought to have been taken away according to the terms of ſale.

Pell,

Pell, Serjeant, for the defendants, contended, that under theſe circumſtances, they had a right to ſtop the goods *in tranſitu.*

Lord ELLENBOROUGH.—The acceptance of warehouſe rent was a complete transfer of the goods to the purchaſer. If I pay for a part of a warehouſe, ſo much of it is mine. This is an executed delivery by the ſeller to the buyer. If there was any conſpiracy or contrivance on the part of the plaintiffs to cheat the defendants out of the price of the goods, proof of that will be an anſwer to this action; but it would be overturning all principles to allow a man to ſay, after accepting warehouſe rent, "the goods are ſtill in my poſſeſſion, and I will detain them till I am paid." The *tranſitus* was at an end. The goods were transferred to the perſon who paid the rent, as much as if they had been removed to his own warehouſe, and there depoſited under lock and key.

Verdict for the plaintiffs.

The *Attorney General, Garrow* and *Marryat* for the plaintiffs.

Pell, Serjeant, and *Lawes* for the defendants.

[Attornies, *Swain & Co.* and *Wegener.*]

Vide Scott *v.* Pettit, 3 B. & P. 469. Smith *v.* Goſs, *ante* 282.

BLACKEN-

BLACKENHAGEN, *v.* THE LONDON ASSURANCE COMPANY.

Saturday, November 5.

THIS was an action of covenant on a policy of insurance on goods in the ship William, at and from London to Reval. The loss was laid in one count to be, by the perils of the sea; in another, by capture.—Plea, *non infregit conventionem* (*a*).

If a ship with goods on board insured to a foreign port, learning in the course of her voyage, that an embargo is there laid on all ships of her nation, waits at some place as near thereto as she safely can, till the embargo is removed, the goods will in the mean time be protected by the policy, while the voyage remains legal: But if she might, upon such an occasion, put into a friendly port adjoining to her port of destination, and instead of doing so, she sails back for her port of outfit, and is lost, she will be considered as having abandoned the voyage insured, and the underwriters will be discharged.

The ship sailed from the Nore on the 15th October 1807, under convoy of the Forrester sloop of war, for the Sound, and arrived there on the 27th of the same month. On the 15th of November, she proceeded from thence towards Reval, under convoy of the Garnet sloop of war. Two days after, while they were proceeding on the voyage, the Captain of the Garnet received information, that an embargo was laid on all British ships in the ports of Russia. In consequence, he ordered the William to put back, and on the 18th she returned to Copenhagen roads. She afterwards lay off Gottenburgh six days, and might have entered that friendly port, if the master had thought fit. But on the 30th of November, she sailed with the fleet for England, under convoy of the Garnet and the Spitfire sloops of war.

The last time she was seen, was on the 3d of December, in a heavy gale of wind, and not having been

(*a*) 11 G. 1. c. 30. § 43.

heard

heard of ſince, it was allowed that ſhe had certainly periſhed on her voyage home.

Lord ELLENBOROUGH.—This caſe will hardly bear to be ſtated. The underwriters were bound to indemnify the plaintiff for any loſs that ſhould happen on the voyage from London to Reval. If being unable to get to Reval, the ſhip had lingered in that quarter, or had neceſſarily returned with an intention of ultimately completing the original voyage, a queſtion of ſome nicety might have ariſen. But by ſailing back for England in the manner ſhe did, the original voyage was abandoned, and the underwriters were diſcharged. The maſter might deem this the moſt adviſeable courſe he could purſue for the benefit of thoſe he repreſented; but were the underwriters ſtill to be liable on the policy, if it had been convenient for him to carry the ſhip to the Straights of Magellan? The caſe which I remember coming neareſt this, was where a ſhip being prevented by the ice from reaching her port of deſtination, took ſhelter for the winter in a place as near to it as ſhe could ſafely go, and proſecuted her voyage the enſuing ſeaſon. Here, had the ſhip been coming home, as the beſt means of getting finally to Reval, and there had been a poſſibility of her being able to accompliſh that object when the loſs happened, ſhe might ſtill have been conſidered in the courſe of the voyage inſured; but all thought of completing the original voyage ſeems to have been abandoned on the 30th of November, and there is no colour for charging the underwriters with a loſs which happened ſubſequently to her ſetting ſail for England.

Plaintiff nonſuited.

Garrow

Garrow and *Puller* for the plaintiff.

The *Attorney General*, *Carr* and *Moore* for the defendant.

[Attornies, *Crowder & Co.* and *Bleasdale & Co.*]

N. The plaintiff afterwards brought an action against the defendant on this policy, in the court of C. P., which was tried at the sittings after last Michaelmas Term.

Sir JAMES MANSFIELD, as well as Lord Ellenborough, clearly thought, that the voyage was abandoned, by the ship sailing for England, instead of putting into Gottenburgh. The Jury, nevertheless, found a verdict for the plaintiff: but in Hilary Term following, the court of C. P. set it aside, and ordered a new trial. —*Vide* Driscol *v.* Bovil, 1 B. & P. 313. Hadkinson *v.* Robinson, 3 B. & P. 388. Hartley *v.* Buggin, Park, 313. a. Lubbock *v.* Rowcroft, 5 Esp. Cas. 50.

HOME

HOME CIRCUIT.

SUMMER ASSIZES, 48 GEORGE III. 1808.

CHELMSFORD.—CORAM M'DONALD, C. B.

SPURRIER *v.* VALE. Friday, Aug. 5.

10. La. R. 413.

THIS was an action on the ſtatute of Anne, for keeping and uſing a gun for the deſtruction of game, without being qualified; and it was clearly proved that the defendant, who acted as coachman and gardener to a Mr. Hippuff, had, during the laſt ſeaſon, ſhot over the manor of Birchanger, in the county of Eſſex.

Bodies corporate who are lords of manors, are not prevented by ſtatute 3 Geo. 1. c. 11. from appointing unqualified perſons their gamekeepers. A deputation to a gamekeeper, who is neither himſelf qualified to kill game, nor is a ſervant to the lord of the manor, need not ſtate on the face of it, that he is appointed to kill game for the uſe of the lord; and it will be preſumed, that whatever game he kills, is for the lord's uſe, till the contrary is proved

On the part of the defendant, a deputation was given in evidence, under the ſeal of the Society of New College, Oxford, who are Lords of the manor of Birchanger, appointing him their gamekeeper, "with full power to kill any hare, pheaſant, &c. in and upon their ſaid manor," but without ſaying "*for their ſole uſe and benefit.*"

The plaintiff's counſel objected to the deputation as being invalid under ſtat. 3 Geo. 1, c. 11. § 1.

whereby it is enacted, " that no lord of a manor ſhall make any perſon to be a gamekeeper with power to kill game, unleſs ſuch perſon be qualified by the laws of this realm ſo to do; or unleſs ſuch perſon be truly and properly a ſervant to the ſaid lord; *or be immediately employed and appointed to take and kill the game for the ſole uſe of the ſaid lord*, and not otherwiſe." Here the defendant Vale did not himſelf pretend to be qualified; he was truly and properly a ſervant to Mr. Hippuff, not to New College, Oxford; and he was not employed to kill game for the uſe of that learned body, but of the maſter whom he ſerved. Indeed, it might be queſtioned, whether under this ſtatute, colleges and other corporations could appoint any perſon a gamekeeper unleſs he was himſelf qualified to kill game.

Sir ARCHIBALD M'DONALD, C. B.—I have recently had occaſion to look attentively into this ſtatute; and I am clearly of opinion, that it does not exclude colleges and corporations from appointing ſuch perſons as they think fit, gamekeepers for the manors of which they may happen to be lords. The ſtatute does not require the perſon appointed, to be a menial ſervant to the lord, but only truly and properly a ſervant. In this caſe, it is not neceſſary that the defendant ſhould be appointed, on the face of the deputation, to kill game for the ſole uſe of the lords of the manor of Birchanger. It will be preſumed that he was ſo, until the contrary is ſhewn on the other ſide. In a penal action, it would be too much to preſume that the defendant killed game contrary to law, without evidence of that fact. Nor ſhould I think it ſufficient to vitiate the deputation,

putation, to prove that in ſome inſtances he had ſold or diſpoſed of the game he killed, to others beſides the lords of the manor of Birchanger.

The defendant had a verdict, which the court of K. B. (*abſente* Lord ELLENBOROUGH, C. J.) afterwards refuſed to ſet aſide; being of opinion, that the preſumption of law was as had been ſtated by the CHIEF BARON at *niſi prius*.

Garrow and *Marryat* for the plaintiff.

Shepherd, Serjeant, for the defendant.

[Attornies, *Clarkſons* and *Sims*.]

In Rogers *v.* Carter, 2 Wilſ. 387, it was held, that a perſon was properly qualified to receive a deputation from the lord of a manor to be a gamekeeper, although he was neither a qualified perſon nor a menial ſervant to the lord of the manor. And now, by ſtat. 48 G. 3. c. 93. § 2. it is enacted, "that it ſhall be lawful for any lord or lady of any manor, to appoint and depute any perſon whatever, whether acting as a gamekeeper to any other perſon or not, or whether retained and paid for as the male ſervant of any other perſon or not, or whether a qualified perſon or not, to be a gamekeeper to any ſuch manor, with authority to ſuch perſon as gamekeeper, to kill game within the ſame, for his own uſe, or for the uſe of any other perſon or perſons whatever, to be ſpecified in ſuch appointment or deputation, whether qualified or not."

MAID-

MAIDSTONE.

Cor. Lord Ellenborough, C. J.

Bamfield v. Massey.

Tueſday, August 9.

In an action for ſeducing the plaintiff's daughter, *per quod ſervitium amiſit*, the plaintiff cannot examine witneſſes to the daughter's general character, except in anſwer to evidence of *general bad character* adduced on the part of the defendant.

ACTION for the ſeduction of plaintiff's daughter, *per quod ſervitium amiſit.*

The ſeduction being proved, one of the witneſſes for the plaintiff was aſked, what character for chaſtity the daughter had borne in the neighbourhood where ſhe lived?

Lord Ellenborough.—Witneſſes cannot be examined by the plaintiff to the character of the daughter, except in anſwer to evidence on the other ſide.

Evidence was afterwards produced on the part of the defendant to prove, that the girl, previouſly to her acquaintance with him, had had a child by another man.

Upon this, the plaintiff's counſel contended they had now a right to put the queſtion which had been before overruled.—But

Lord Ellenborough held, that they could not, as no evidence of general bad character had been offered; and

and that they were reſtricted to diſproving the ſpecific breach of chaſtity alleged on the part of the defendant.

The plaintiff had a verdict, with 100*l.* damages.

Shepherd, Serjeant, and *Lawes* for the plaintiff.

Onſlow, Serjeant, and *Marryat* for the defendant.

[Attornies, *Hill* and *Maſon*.]

Vide Roberts *v.* Malſton, Bul. N. P. 296. Elſam *v.* Faucet, 2 Eſp. Caſ. 562. Doe *ex d.* Farr, *v.* Hicks, 4 Eſp. Caſ. 51. Biſhop of Durham *v.* Beaumont, *ante* 207.

REX *v.* HOWE.

Wedneſday, Auguſt 10.

THIS was an information by the *Attorney General*, for obſtructing revenue officers in the execution of their duty.

A. was examined before two magiſtrates on an information againſt B. for having ſmuggled ſpirits in his poſſeſſion; and was afterwards examined on the trial of an indictment againſt B. for aſſaulting revenue officers while they were attempting to ſeize theſe ſame ſpirits. On this laſt occaſion, A. ſwore that he had always given the ſame account of the tranſaction. Held, that the record of B.'s conviction on the information, in which A.'s evidence before the magiſtrates was ſet out, was not legal evidence to contradict A., by ſhewing that he had given a different account of the tranſaction when firſt examined.

The caſe on the part of the crown was, that the defendant aſſaulted the officers while they were endeavouring to ſeize ſome caſks of ſmuggled ſpirits which he was carrying off in a gig.

An information for having theſe ſpirits in his poſſeſſion had been laid againſt him before two magiſtrates, who, after a full hearing, condemned the ſpirits as forfeited, and convicted him in the penalty provided by the ſtatute for this offence.

He now called ſeveral witneſſes to prove an *alibi*. Theſe witneſſes had likewiſe been examined before the magiſtrates; and one of them being aſked, whether he had not given a different account of the matter when formerly examined, maintained that he had not. To contradict him, the counſel for the crown propoſed to put in the record of the conviction, containing the witneſs's teſtimony on that occaſion; which they contended was legal evidence of what he had then ſworn, as magiſtrates are required by Act of Parliament to inſert in the conviction all the evidence adduced before them, and the preſumption of law muſt be, that they did their duty.

Lord ELLENBOROUGH.—I will admit the record to prove the condemnation, the purpoſe for which by law it is effectual, but not to contradict the witneſſes. For *that*, I ſhould require the evidence on oath of perſons who were preſent before the magiſtrates, and heard all that was ſworn.

The defendant was acquitted.

Shepherd, *Beſt*, Serjeants, and *Bolland* for the proſecution.

Marryat and *Gurney* for the defendant.

[Attornies, *Meyew* and *Donne*.]

But

But depoſitions taken before a magiſtrate under 1 & 2 Ph. & M. c. 13. and 2 & 3 Ph. & M. c. 10. might, I preſume, be uſed to contradict the ſubſequent teſtimony of the deponent; ſuch faith being given to them, that in caſe of the deponent's death, they may be read in evidence againſt the priſoner. —Rex *v.* Weſtbeer, Leach, Cro. Caſ. 14.—Rex *v.* Radbourne, *Ib.* 514.

BALSTON *v.* BENSTED.

Thurſday, Auguſt 11.

After twenty years uninterrupted enjoyment of a ſpring of water, an abſolute right to it is gained by the occupier of the cloſe in which it iſſues above ground, and the owner of an adjoining cloſe cannot lawfully cut a drain, where by the ſupply of water to the ſpring is diminiſhed.

THE declaration ſtated, that the plaintiff was poſſeſſed of a certain cloſe or piece of land with the appurtenances, into which ſame cloſe a certain ſpring or run of water had run and ouzed, and been uſed and accuſtomed to run and ouze, and of right ought to have run and ouzed, and ſtill of right ought to run and ouze, in great plenty and abundance, for the ſupply of a certain bath, reſervoir or baſon of water in the ſaid cloſe; yet that the defendant wrongfully, wilfully and maliciouſly lowered and ſunk the bed and channel of the water of ſuch ſpring or run of water, near to the ſaid cloſe, and the drains and tunnels for carrying off the ſaid ſpring or run of water, and thereby diverted and turned divers large quantities of the water of the ſaid ſpring or run of water out of the ſame, and away from the ſaid cloſe, and hindered and prevented the ſame quantities of water from running and ouzing unto and into the ſaid cloſe, and from ſupplying the ſaid bath, reſervoir and baſon, and plaintiff for want of ſufficient water could not uſe a certain mill and works erected upon the ſaid cloſe, or

exerciſe his trade of a paper maufacturer therein, or have and enjoy the uſe, profit and advantage of the ſaid bath, reſervoir and baſon, *in tam amplo modo*, &c. —Plea, *not guilty*.

The plaintiff and defendant are reſpectively owners of adjoining cloſes on the banks of the river Medway. As far back as could be recollected, there had been a guſh of water from a hole in the plaintiff's cloſe, which uſed to run from thence on the ſurface of the ground into the river. About 27 years ago, a bath was erected by the then occupier of the cloſe, near where the ſpring iſſued forth, and the water was conducted into it by a pipe. From that time till the preſent cauſe of action aroſe, the bath was amply ſupplied with water, and a conſiderable profit was derived from letting out the uſe of it to the public. In 1805, the plaintiff purchaſed this cloſe, and erected a paper manufactory upon it; for which a copious ſupply of ſpring water is eſſentially requiſite. About the ſame time, the defendant becoming owner of the adjoining cloſe, opened a ſtone quarry in it. As the excavations proceeded, conſiderable quantities of water were found, which interrupted the workmen. A deep drain was afterwards made to carry it off into the river, and the quarry was left dry. But, in the mean time, the water flowing into the plaintiff's bath had been gradually decreaſing, and ſubſequently to the making of the drain did not amount to more than an eighth or tenth part of its former quantity. On the idea, therefore, that the defendant had unlawfully diverted the water coming to the ſpring, this action was brought.

The

The defence intended to be ſet up was, that the plaintiff had no excluſive right to the ſupply of water he claimed; as the principle on which 20 years enjoyment of running water confers a right to it, appeared from the caſes to be, that after an adverſe poſſeſſion for ſo long a time, a grant was to be preſumed from the owners of the land farther up the ſtream, and ſuch a grant could not be preſumed here, as previouſly to the drain being made, probably no individual knew that the plaintiff's ſpring was fed by water percolating through the ſtrata in the cloſe now occupied by the defendant. But

Lord ELLENBOROUGH obſerved early in the trial, that the only queſtion was, whether the diminution of the ſupply of water to the plaintiff's bath had been cauſed by the drain dug by the defendant; and that there could be no doubt but that 20 years excluſive enjoyment of water in any particular manner, affords a concluſive preſumption of right in the party ſo enjoying it.

The *cauſation* being afterwards clearly made out, it was agreed, upon the recommendation of the court, that the water ſhould be conveyed from the defendant's quarry to the plaintiff's bath in the manner that ſhould be directed by an arbitrator.—A juror was therefore withdrawn.

Shepherd, Serjeant, *Marryat* and *Berens* for the plaintiff.

Gurney and *Roberts* for the defendant.

Vide Bealey v. Shaw, 6 Eaſt, 208.

Same day.

DEAN AND CHAPTER OF ROCHESTER *v.* PIERCE.

An action for use and occupation may be maintained by a corporation aggregate.

In such an action by a Dean and Chapter, if the name of the present Dean is mentioned at the beginning of the declaration, and it is afterwards laid that the occupation was, "by the permission of the *said Dean* and Chapter," and it appears in evidence that the defendant occupied only in the time and by the permission of *a former Dean*, this is a fatal variance.

KENT (to wit).—The Right Worshipful William Beaumont Busby, Doctor in Divinity, Dean of the cathedral church of Christ and the Blessed Virgin Mary of Rochester in the County of Kent, and the Chapter of the same church, complain of W. J. Pierce being, &c. of a plea that he render to the said Dean and Chapter the sum of, &c. For that whereas the said W. J. on &c. at &c. was indebted to the said Dean and Chapter in the sum of &c. for the use and occupation of a certain messuage, &c. by the said W. J. and at his special instance and request, *and by the permission of the said Dean and Chapter* before that time had, held, used, occupied, possessed and enjoyed for a long space of time before then elapsed; by reason whereof an action hath accrued to the said Dean and Chapter, to demand and have the said sum of &c. —Plea, *nil debet*.

It appeared that the defendant, without any demise by deed, had occupied a cottage belonging to the Dean and Chapter of Rochester; but that this was prior to *Dr. Busby*, the present Dean, becoming head of the corporation, and in the time of his predecessor *Dr. Goodenough*.

Lawes, for the defendant, first objected, that *use and occupation* could not be maintained by a corporation aggregate, as they could only demise by deed.

Lord

Lord ELLENBOROUGH.—A corporation cannot demiſe except by deed; but the action for uſe and occupation does not neceſſarily ſuppoſe any demiſe. It is enough that the defendant uſed and occupied the premiſes by the permiſſion of the plaintiff; and a corporation, as well as an individual, may without deed permit a perſon to uſe and occupy premiſes of which they are ſeiſed. I am of opinion that there is no objection to the action on this ground.

Lawes then contended that the plaintiffs muſt be non-ſuited for a variance between the declaration and the evidence, as they had laid the occupation to have been, by the permiſſion of *Dr. Buſby*, and it turned out to have been by the permiſſion of *Dr. Goodenough*.

Shepherd, Serjeant, *contra*, argued, that as this action was brought by a corporation aggregate, it did not ſignify who was Dean when the cauſe of action accrued; that it was unneceſſary to mention the name of Dr. Buſby at all, and that his name might, therefore, be rejected; that the averment as to the permiſſion of the *ſaid Dean and Chapter*, referred only to "the Dean and Chapter of Chriſt and the Bleſſed Virgin Mary of Rocheſter," not to the individual Dean now the head of the corporation; and that the caſe ſtood preciſely the ſame as if the occupation had been in the time of Dr. Buſby, or as if his name had never been mentioned.

Lord ELLENBOROUGH.—As you have mentioned the name of the Dean, though unneceſſarily, I think you have rendered it material, and the words "by

the permiſſion of the *ſaid* Dean," muſt mean, of the Dean named at the beginning of the declaration, viz. Dr. Buſby. But it appears that when the defendant occupied the premiſes in queſtion, Dr. Buſby was not Dean of Rocheſter. I think the variance is fatal.

Plaintiff nonſuited.

In Hilary Term following both theſe points were learnedly diſcuſſed in the Court of K. B. upon a motion to ſet aſide the nonſuit.

As to the firſt, the JUDGES were unanimouſly of opinion that uſe and occupation might be maintained by a corporation aggregate; and the objection was abandoned in the courſe of the argument.—On the ſecond, concerning the *variance*, they took time to conſider; and the LORD CHIEF JUSTICE afterwards intimated, that they were equally divided, ſo that they could make no order, and the nonſuit would ſtand.

Shepherd, Serjeant, *Marryat* (and *Dampier* in banco) for the plaintiff.

Lawes for the defendant.

Vide Dyer, 86. a. Bro. Abr. Corporation, 6. — 2 Inſt. 666. Com. Dig. Pleader, 2 B. 1. 2.

LEWES.

CORAM M'DONALD, C. B.

REID *v.* MARGISON, ESQ. LATE SHERIFF OF SUSSEX.

Same day.

DEBT for an eſcape of one R. Banham, taken in execution upon a judgment obtained againſt him at the ſuit of the plaintiff.—Plea, *nil debet.*

To prove an examined copy of a record, it is ſufficient for a witneſs to ſwear, that he examined the copy while another perſon read the original.

The witneſs who produced a copy of the judgment ſaid, that he examined the copy while another perſon read the original; but that he had not looked at the original while that or any other perſon read the copy.

It was ſtrongly objected that this was not ſufficient evidence of the paper writing produced being a copy of the judgment, and that the witneſs ought either to have examined it both ways, or that both perſons engaged in the examination ought to have attended and been ſworn.

Sir ARCHIBALD M'DONALD, C. B. ſaved the point; and evidence being given that the Sheriff's officer

officer had permitted Banham to remain three days at a public houſe after the arreſt, there was a verdict for the plaintiff.

In the enſuing term, the Court of Exchequer granted a rule to ſhew cauſe why the verdict ſhould not be ſet aſide, on the ground that there had been no ſufficient proof of the judgment: but, cauſe being ſhewn in laſt Hilary Term, the BARONS were unanimouſly of opinion that the evidence adduced at the trial was ſufficient.—THOMPSON, B. The objection ſuppoſes that a perſon wilfully miſread the records of the court; but the preſumption is that every man will do his duty. Here it was open to the defendant to ſhew that the writing produced was not a true copy of the Judgment.—WOOD, B. Had the witneſs who was called done all that the defendant requires, ſtill the other perſon engaged in the examination might, by poſſibility, have miſread the copy as well as the original; and it would come to this, that to prove a copy of a record there muſt always be two witneſſes, the man who read, and the man who examined. But this would be a great public inconvenience, and there is no rule of law to require it.—*Rule diſcharged.*

Beſt, Serjeant, and *Andrews* for the plaintiff.

Shepherd, Serjeant, and *Marryat* for the defendant.

[Attornies, *Stuart* and *Palmer* & *Pugh*.]

Gyles

GYLES *and another, assignees of Smith, a bankrupt,* v. HILL *and another.* C. P. Sittings in H. T. 1809. Coram LAWRENCE, J.

The petitioning creditor's debt relied upon was a judgment confessed to him by the bankrupt for 200*l.* An examined copy of this was offered in evidence. The witness producing it swore, that he received it from the clerk of the office, who read the original while the witness examined the copy. Being asked whether he had examined it both ways, he answered in the negative.—*Shepherd*, Serjeant, then objected to this proof.—But

LAWRENCE, J. said, I consider this quite sufficient. It has been ruled so a hundred times. Here the original was read by the officer of the court; but I should have ruled the same way, had it been read by any other person.

Vide M'Neil *v.* Perchard, 1 Esp. Cas. 263. — A copy delivered out by a person appointed by the law for that purpose, is evidence, without any proof of its being examined, as in the instances of the chirograph of a fine, Bul. N. P. 229,—rules of court, 1 Lord Raym, 745, and — depositions taken before a Judge, Duncan *v.* Scott, *ante*, 101.

GUILDFORD.

CORAM LORD ELLENBOROUGH, C. J.

NEAL AND OTHERS *v.* VINEY. Friday, Aug. 19.

INDEBITATUS assumpsit for crops of corn, grass, and turnips bargained and sold, and for goods sold and delivered.

By an agreement between the plaintiffs and the defendant; the defendant was to accept of the assignment of the lease of a farm from the plaintiffs, and to take the fixtures and crops at a valuation. He was afterwards let into possession of the fixtures, and the crops were valued to him; but the lease was never assigned. Held, that *indebitatus assumpsit* would not lie for the price of the fixtures and crops, and that the plaintiff's only remedy was by a special action on the agreement.

It appeared that by a written agreement between the parties, the defendant was to purchaſe of the plaintiffs the leaſe of a farm at Bletchingly for 500*l.*, and was to take the fixtures in the farm houſe, together with the growing crops of corn, &c. at a fair valuation. Having paid a depoſit of 20 per cent. upon the purchaſe money, he was let into poſſeſion; and the fixtures and crops were valued to him at about 1200*l.* But a good title not being made by the plaintiffs, he had refuſed to pay any part of this ſum, or the remainder of the purchaſe money. It was for the value of theſe crops and fixtures that the preſent action was brought.

Shepherd, Serjeant, for the defendant, contended, that the agreement was entire, and could not thus be ſplit into parts. It was not competent for the plaintiff to ſeparate the crops and fixtures from the leaſe. In fact it was with a view to the one that the defendant had agreed to take the others, and without it they would be of little or no uſe to him. But in this action the defendant was prevented from ſhewing that the plaintiffs could make no good title, and that he was liable at any time to be turned out of the farm by a third perſon.

Beſt, Serjeant, on the other ſide, maintained, that the two parts of the agreement were entirely independent of each other; that it was competent to the plaintiffs to bring an action either for not accepting of the aſſignment of the leaſe, or for not paying according to the valuation;—and that the defendant having at any rate derived ſome benefit from the fixtures and crops, was liable in this form of action to make a correſponding compenſation to the plaintiffs.

He

He cited as in point, Boone *v.* Eyre, 1 H. Bl. 273. *n.* Campbell *v.* Jones, 6 T. R. 570. and Hall *v.* Cazenove, 4 East, 477.

Lord ELLENBOROUGH was of opinion that the agreement was entire, and ſhould have been ſpecially declared upon. He therefore directed *a nonſuit.*

Beſt, Serjeant, and *Harriſon* for the plaintiffs.

Shepherd, Serjeant, and *Marryat* for the defendant.

[Attornies, *Chilton* and *Druce.*]

Vide Champion *v.* Short, *ante* 53.

STANTE *v.* PRICKET.

Same day.

In an action of aſſault and battery, if the declaration contains but one count, the plaintiff, after proving one aſſault, cannot waive that, and proceed to give evidence of another

ASSAULT and battery, the declaration containing but one count.—Plea, *not guilty.*

The plaintiff's counſel having given evidence of an aſſault in the defendant's ſhop, wiſhed to waive this, and go on to prove another aſſault after the plaintiff had been turned out of the ſhop.—But

Lord ELLENBOROUGH ſaid this could not be done, and that the plaintiff muſt ſhape his caſe in the moſt favourable manner he could from the firſt; or the conſequence would be, that one aſſault being complained of, the court and jury might be kept waiting till twenty were

were proved, that it might be ſeen which of them the plaintiff ſhould ſelect and rely upon as the beſt.

The plaintiff had a verdict with 1*s.* damages.

Beſt, Serjeant, and *Andrews* for the plaintiff.

Shepherd, Serjeant, for the defendant.

[Attornies, *Meymott* and *Burt.*]

Same day.

BRICKLAND AND OTHERS, ASSIGNEES OF MASON, A BANKRUPT, *qui.* NEWSOME, LATE SHERIFF OF SURREY.

To ſupport a commiſſion of bankrupt, where there is only one petitioning creditor, there muſt be a debt due to him ſeparately, for which he could maintain an action at law in his own name.—Therefore one of two joint obligees is not by himſelf a good petitioning creditor againſt the obligor.

MONEY had and received, to recover the price of certain goods of the bankrupt taken in execution after an act of bankruptcy.

The chief queſtion which aroſe was, whether there exiſted a ſufficient petitioning creditor's debt to ſupport the commiſſion.

Brickland was the only petitioning creditor. To him and another perſon of the name of Duplock, the bankrupt had given a *joint* bond, which was forfeited before the bankruptcy, by the nonpayment of the money for which it was meant as a ſecurity.

Lord ELLENBOROUGH was clearly of opinion that the petitioning creditor's debt was inſufficient in this caſe, as there was no debt due from the bankrupt to Brickland alone; and as there ought to be proper parties

ties as petitioning creditors, who could by themſelves maintain an action at law for the debt relied upon.

It was agreed, however, that there ſhould be a verdict for the plaintiff, with leave for the defendant to move to enter a nonſuit.

In Hilary Term following the caſe was argued in the Common Pleas, when that COURT agreeing in opinion with the CHIEF JUSTICE of K. B., that the petitioning creditor's debt was inſufficient, ordered the verdict to be ſet aſide and a nonſuit to be entered.

Beſt, Serjeant, and *Lawes* for the plaintiffs.

Shepherd, Serjeant, and *Runnington* for the defendant.

[Attornies, *Rippon* and *Boville*.]

But a ſeparate commiſſion may be taken out againſt one of ſeveral partners on the petition of a joint creditor. Criſpe *v.* Perritt, Willes, 467.

It is now decided that proceſs cannot be lawfully executed in Kenſington Palace. WINTER *v.* MILES AND ANOTHER. *Sittings after Eaſter Term* 48 *Geo. III.* — Action againſt the ſheriff of Middleſex for a falſe return of *nulla bona* to a writ of *fi. fa.* againſt the goods of H. R. H. the Duke of Suſſex. Evidence was given that between the iſſuing and the return of the writ there were effects belonging to H. R. H. in Kenſington Palace; and the queſtion was, whether the Sheriff ought to have entered and taken them in execution? — It was admitted that his preſent Majeſty had never perſonally reſided there, and it was proved that ſeveral private families, nowiſe connected with the royal houſehold occupy apartments in

in the palace, by permiſſion of the Lord Chamberlain. — On the other hand, it appeared that H. M. employs a houſekeeper and gardeners to take care of the houſe and grounds; that divine ſervice is regularly performed in the chapel by one of H. M.'s chaplains; that the ſtate apartments which were formerly appropriated to the immediate perſonal occupation of the ſovereign, are ſtill kept up, and not applied to any other purpoſe; that there is a throne in one of them, and that in others there are beds (though not in a fit ſtate to be uſed,) and a valuable collection of pictures, H. M.'s property. — It was contended on the part of the plaintiff, that to entitle a palace to the privilege claimed in this caſe, it muſt be the perſonal reſidence of the ſovereign, — For the defendant, it was argued, that a virtual reſidence of the ſovereign by his officers and ſervants was ſufficient. — Lord ELLENBOROUGH ſaid, the ſheriff was to make effectual execution; but he was not obliged to incur a contempt or to commit an offence againſt the King's prerogative. He had the authority of Lord Coke for ſaying, that by the common law no proceſs ought to be executed within any palace where the King's royal perſon reſideth; and the only queſtion was, whether Kenſington palace was a royal reſidence? It had been ſo once, and at what particular moment had it ceaſed to be ſo? To entitle it to the privileges of a royal reſidence, it was not neceſſary that the King ſhould ſleep or ſpend much of his time there. If he kept it in a condition to receive him, ſhould it be his pleaſure to return to-morrow and live there with his family, this was ſurely enough to protect it againſt the intruſion of ſheriff's officers. From the ſtate apartments being reſerved, and ſeveral royal domeſtics being ſtationed about the palace, as well as from other circumſtances, it clearly appeared that H. M. had not totally quitted it as a place of reſidence, and that he muſt ſtill be ſuppoſed to have the *animus revertendi*. Strong reaſons might be mentioned againſt allowing legal proceſs to be executed in a place ſo circumſtanced. Upon the whole, his Lordſhip was of opinion that Kenſington palace was privileged as a royal reſidence; and the jury found for the defendant. — In T. T. following a rule riſi was granted for a new trial; againſt which cauſe was ſhewn in M. T., and which was diſcharged in H. T; the court, after taking time to conſider having unanimouſly determined, that the writ could not have been lawfully executed in Kenſington palace, and that the ſheriff had therefore properly made a return of *nulla bona*. *Vide* 3 Inſt. 141. Elderton's caſe, 2 Lord Raym. 978.

CASES

ARGUED AND RULED AT

NISI PRIUS

IN K. B.

At the Sittings after Michaelmas Term,

49 GEORGE III. 1808.

ADJOURNED SITTINGS AT WESTMINSTER.

GOODLAND *v.* BLEWITH.

Thurſday, Dec. 1.

A tender of money to an agent authorized to receive payment, is a good tender to the creditor himſelf.

INDEBITATUS aſſumpſit for goods ſold and delivered.—*Plea*, non aſſumpſit to all except 2*l.* 17*s.*, and as to that a tender.—*Replication*, that the plaintiff ſued out a bill of Middleſex in this action on the 4th day of November laſt, and that no tender of the 2*l.* 17*s.* was made before that day.—*Rejoinder*, that defendant tendered this ſum before the ſuing out of the precept: whereupon iſſue was joined.

The goods in queſtion had been delivered to the defendant by one Weſt, the plaintiff's ſervant, who was authoriſed to receive payment for them; and there was evidence, that in the end of Octo-

ber the defendant had offered to pay Weſt the balance due, at the ſame time producing the money, which the latter refuſed to receive.

Garrow inſiſted that this was not a good tender, and that the money ought to have been offered to the plaintiff himſelf.—But

Per Lord ELLENBOROUGH.—A tender to an agent authoriſed to receive payment, is as good as a tender to the creditor in perſon.

The defendant had a verdict.

The caſe was afterwards brought before the court; but the direction of the CHIEF JUSTICE upon this point was acquieſced in.

Garrow and *Wigley* for the plaintiff.

Park for the defendant.

[Attornies, *Grove* and *Manning*.]

The demand of a debt, to do away the effect of a tender, muſt be by ſome one authorized to give the debtor a diſcharge.

Coles *v*. Bell. Sittings after M. T. 49 G. III.

Declaration for goods ſold.—Plea, tender.—Replication, ſubſequent demand; and iſſue thereupon. The demand had been made by the clerk to the plaintiff's attorney, who had never ſeen the defendant before going upon this errand. Lord ELLENBOROUGH held the demand inſufficient; as it ought to have been made by ſome perſon authorized

authoriſed to give the defendant a diſcharge. A demand by the attorney himſelf, his Lordſhip ſaid, might have done:—The defendant had a verdict.—*Vide* Spybey *v.* Hide, *ante* 181.

WELEKER *v.* LE PELLETIER.

Same day.

THE defendant, being ſued by the name of *Louis* Le Pelletier, pleaded in abatement, "that he was baptized by the name of *Louis Auguſte Alexander*, and by the chriſtian name of *Louis Auguſte Alexander* had always ſince his baptiſm hitherto been called and known." Replication, "that the defendant was not baptiſed by the name of *Louis Auguſte Alexander*;" and iſſue thereupon.

If a defendant ſued by the name of A. pleads in abatement, that he was baptized by the name of B., he muſt prove that this name was given him by baptiſm, and it is not enough for him to ſhew, that he has always been known and called by the name of B.

Gaſelee, for the defendant, ſtated, that from his client being a French emigrant, it had been found impoſſible to procure any direct proof of his baptiſm; but he offered to adduce the following evidence, from which, he contended, it muſt be inferred by the jury that the defendant had been baptiſed by the name of *Louis Auguſte Alexander*. 1. The fact that he was always known in France by this name before the revolution in that country. 2. A commiſſion to him as an officer in this name from Louis XVI. 3. A commiſſion to him in this name as a cornet in the Britiſh ſervice from George III. 4. Letters of denization to him in this name from the ſame ſovereign.

Lord ELLENBOROUGH.—How does it appear from ſuch evidence, that the defendant was ever baptized

at all? If it had been proved, that he was carried out to church when an infant, for the purpose of being baptised, and that ever after his return he was called by a particular name, there would have been fair ground for the presumption, that this was his name of baptism. But without some evidence of this sort, how do I know that he is not of the Jewish or some other persuasion in which the rite of baptism is unknown? According to the argument for the defendant, I must presume that in all cases the name that a man goes by was given him by baptism. This presumption would not unfrequently be against the fact. There is an instance commonly given in the books, of Sir Francis Gaudy, so called by his name of *confirmation* (*a*). If this plea went to the merits of the action, I should be disposed to make great allowances for the difficulty of procuring evidence under such circumstances in support of it; but it is quite collateral to the justice of the plaintiff's demand, and deserves no favour. You must therefore go farther, and give some evidence of the baptism.

(*a*) "If a man be baptised by the name of Thomas, and after at his confirmation by the bishop he is named John, he may purchase by the name of his confirmation. And this was the case of Sir Francis Gaudie, late chief justice of the court of common pleas, whose name of baptism was Thomas, and his name of confirmation Francis; and that name of Francis, by the advice of all the judges, in *anno* 36. Hen. 8. he did beare, and after used in all his purchases and grants. And this doth agree with our ancient books, where it is holden that a man may have divers names at divers times, but not divers Christian names." Co. Litt. 3. a.

Gaſelee obſerved, that it was not neceſſary for the defendant to have pleaded that he was *baptiſed* by the name of Louis Auguſte Alexander (*b*); and that the ſubſtance of the iſſue might be conſidered to be, whether he had been always called and known by that name?

Lord ELLENBOROUGH.—As the defendant has pleaded (although unneceſſa ily) that he was *baptized* by a particular name, he is bound to prove this allegation (*c*).

The plaintiff had a verdict with nominal damages, being unprepared with any evidence of his demand.

Garrow and *Eſpinaſſe* for the plaintiff,

Gaſelee for the defendant.

[Attornies, *Popkin* and *Pitcher*.]

(*b*) Com. Dig. abatement F. 17.

(*c*) *Vide* Walden *v.* Holman, 1 Salk. 6, where defendant pleaded, "that he was baptiſed by the name of J. et per nomen et cognomen de J. W. ſemper, &c. cognitus et vocatus fuiſſet, abſque hoc, that he was called or known by the name and ſurname of B.W." and HOLT, C. J. ſaid "that the traverſe was material, *and likewiſe the inducement.* One may have a nomen and cognomen that never was baptiſed, and thouſands in fact have."

Friday, Dec. 2.

O'MEALEY *v.* WILSON AND ANOTHER.

If a Britiſh ſubject voluntarily reſides in an enemy's country and carries on commerce there, he is diſqualified, as an alien enemy, to ſue in our courts of juſtice, although naturalized by a neutral ſtate, and recognized as a citizen of that ſtate both by its diplomatic agents and by the enemy's government.

And *ſemble*, that if a neutral voluntarily reſides and carries on a commerce in an enemy's country, he is an alien enemy to all civil purpoſes.

SCIRE facias againſt the defendants as the bail of one Newell (*a*).—Pleas, 1. That plaintiff long before and at the time of exhibiting his bill againſt Newell, was and now is an enemy of our Lord the King, inhabiting and dwelling within the realm and territory of France, and within the allegiance and under the government of the perſons exerciſing the powers of government there, and that a public and open war then was, and from thence continually hitherto has been and now is carried on and proſecuted by the ſaid perſons ſo exerciſing the powers of government in France againſt our ſaid Lord the King. 2. That plaintiff is a ſubject of France, and reſides of his own free will and pleaſure within the territory of France, and carries on trade and commerce as ſuch ſubject there. 3. That plaintiff reſides in France, and adheres to the perſons exerciſing the powers of government in that country.

It appeared that Mr. O'Mealey has reſided in France for a conſiderable number of years; that he at preſent lives in Paris as an American citizen; that he is recognized as ſuch by the American Ambaſſador there (*b*); and that he is employed in pre-

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(*a*) *Vide* O'Mealey *v.* Newell, 8 Eaſt, 364.

(*b*) The certificate of the American Ambaſſador at Paris, that the plaintiff is a citizen of the United States, was offered in evidence, but rejected.

ſenting

ſenting *American claims* to the French government; but that he had on ſeveral occaſions talked of Ireland as his country, and of the Iriſh as his countrymen.

The *Attorney General*, for the defendants, contended that under theſe circumſtances the plaintiff muſt clearly be conſidered as an alien enemy.

Park, contrà, inſiſted that he was to be looked upon as an American citizen, who being a neutral might maintain an action in our courts, though living in an enemy's country.

Lord ELLENBOROUGH.—If a Britiſh ſubject reſides in an enemy's country without being detained as a priſoner of war, he is precluded from ſuing here. Nor does it ſignify that he is recogniſed as a citizen by a neutral ſtate. He cannot throw off his allegiance to his native ſovereign. Therefore, if the plaintiff is an Iriſhman by birth, and now voluntarily reſides and carries on trade in France, the defendants are entitled to a verdict on each of their three pleas.—[His Lordſhip likewiſe obſerved in the courſe of the trial, that if the plaintiff was domiciled in France, the place of his birth was immaterial; he muſt be conſidered as a ſubject of that ſtate in which he reſides and carries on commerce; and doing ſo in a country with which we were at war, to all civil purpoſes he was an enemy] (*a*).

(*a*) *Vide* M'Connell v. Hector, 3 B & P. 113. — Brandon v. Neſbit, 6 T. R. 23. — Caſſeres v. Bell, 8 T. R. 166. — De Lunneville v. Phillips, 2 N. R. 96. — Kenſington v. Inglis, 8 Eaſt, 273. — Vanbrynen v. Wilſon, 9 Eaſt, 321.

In *Scire facias* the plaintiff may be nonsuited.

Park then proposed to be nonsuited.

The *Attorney General* said he remembered no instance in which a nonsuit had been allowed in *scire facias*.

Lord ELLENBOROUGH.—I have no doubt that there may. At any period when the plaintiff is demandable, if he does not appear, there shall be judgment of nonsuit against him, unless there be something on the record inconsistent with such a judgment. Nothing of that sort appears in this case to prevent the plaintiff from abandoning his suit when he is called to hear the verdict.

Plaintiff nonsuited (*a*).

Park and *Parnther* for the plaintiff.

The *Attorney General* and *Scarlett* for the defendant.

[Attornies, *Druce* and *Smith*.]

(*a*) *Vide* Paxton *v.* Sir Home Popham, 10 East, 366. Harding *v.* Spicer, *ante* 327.

COTES

COTES *v.* DAVIS.

Same day.

ACTION by the indorſee againſt the maker of a promiſſory note for 24*l.* 17*s.*, payable to "*Mrs. Carter or order*," and indorſed by her in the name of "*M. Carter.*"

If a promiſſory note is made payable to a married woman, and ſhe indorſes it for value in her own name, and the maker afterwards promiſes to pay it,—in an action againſt him by the indorſee, it will be preſumed, that the nominal payee had authority from her huſband to indorſe the note in that form, and the indorſement will be conſidered as veſting a legal title to the note in the plaintiff.

Evidence was given of the hand-writing of the maker, and of the payee, who was proved to paſs in the world by the name of *Mrs. Carter.* It likewiſe appeared, that the plaintiff had given a valuable conſideration for the note; that when it was preſented for payment by a notary, with the indorſement upon it, the defendant ſaid, it ſhould be paid in a few days; and that he afterwards aſked for further time when the action was commenced and the declaration had been delivered.

Garrow, for the defendant, offered to prove that Mrs. Carter, the payee, was the wife of a man of the name of Cole, who was ſtill alive; and contended, that if this fact was eſtabliſhed, the plaintiff muſt be nonſuited. It had been decided, that no title to a bill of exchange or promiſſory note could be made through the indorſement of a feme covert; and what the defendant ſaid after the bill had become due, muſt be immaterial, if he was not previouſly liable.

Lord ELLENBOROUGH.—The huſband may authorize the wife to indorſe bills of exchange or promiſſory notes, as his agent; and, after the acknowledgments

and promiſes of the defendant in this caſe, it may reaſonably be preſumed againſt him, that Mrs. Carter had authority from her huſband to indorſe the note in queſtion.

Garrow.—But in that caſe, the indorſement ought to have been in the name of the huſband.

Lord ELLENBOROUGH.—We may fairly carry the preſumption one ſtep farther, and preſume, that the huſband authorized her to indorſe notes in the name by which ſhe herſelf paſſed in the world. The defendant is now eſtopped from conteſting her authority for this indorſement.

Verdict for the plaintiff.

The *Attorney General* and *Hammond* for the plaintiff.

Garrow for the defendant.

[Attornies, *Greenwell* and *Dixon.*]

Vide Barlow v. Biſhop, 1 Eaſt, 432, where a promiſſory note being given by the defendant to a married woman, whom he knew to be ſuch, with intent that ſhe ſhould indorſe it to the plaintiff in payment of a debt which ſhe had contracted to him in the courſe of carrying on a trade on her own account by the conſent of her huſband,—it was held, that the property in the note veſted in the huſband by the delivery to the wife, and that no intereſt paſſed by her indorſement in her own name to the plaintiff. But there, the defendant had made no promiſe to the indorſee after the indorſement.—Except in the inſtance of a feme covert, it is no defence to an action on a bill or note, that the plaintiff derives title through one who would not himſelf have been liable upon it. Taylor v. Croker, 4 Eſp. Caſ. 187. Haly v. Lane, 2 Atk. 182.

SCHONDLER

SCHONDLER AND ANOTHER, ASSIGNEES OF DAVIS, A BANKRUPT, *v.* WACE.

Monday, Dec.

MONEY had and received to the uſe of the plaintiffs as aſſignees.—Plea, the general iſſue.

Davis, before his bankruptcy, had effected a policy of inſurance upon his own life with the Amicable Inſurance Society. This he did not deliver up, or diſcover to the commiſſioners or his aſſignees. At the time of his laſt examination, there were five quarters of the premium in arrear; and unleſs theſe had been very ſoon paid, the policy would have been forfeited. By the rules of the Amicable Society, ſuch policies being aſſignable, Davis offered to aſſign this policy to one Gardiner for the 16th part of a lottery ticket. This offer was accepted, and Gardiner having paid up the arrears, aſſigned the policy for a valuable conſideration to the defendant. Davis dying immediately after, at the age of 40, the defendant received the ſum for which the policy upon his life had been effected.

Park, for the aſſignees, contended, that this was clearly money had and received to their uſe. By ſtat. 5 Geo. 2. c. 30. § 1. the bankrupt was bound to have diſcloſed and delivered up the policy for the benefit of his creditors (*a*); and though he had failed to do ſo, it paſſed under the aſſignment as part of his effects.

A policy of inſurance effected by a bankrupt upon his own life at an annual premium, paſſes to his aſſignees, however ſmall the apparent value of it may be at the time of his bankruptcy, and although there are conſiderable arrears of premium then due upon it: and if, inſtead of delivering it up as part of his effects, he ſecretly aſſigns it to another perſon, who pays the arrears of the premium, and upon the death of the bankrupt receives the ſum inſured, this ſum, deducting the amount of the arrears ſo paid, may be recovered by the aſſignees as money had and received to their uſe.

(*a*) The words of the ſtatute are—"all ſuch effects, of which the party was poſſeſſed or intereſted in, or whereby he hath or may expect, any profit, poſſibility of profit, benefit or advantage whatſoever."

Garrow

Garrow, on the other ſide, made two points, 1ſt, that the policy upon the bankrupt's life was a thing which from its nature could not paſs to the aſſignees, as they had no fund from which they could have paid the premium; and 2dly, that they had abandoned their claim to it, by not paying the arrears, or interfering till the bankrupt's death.

Lord ELLENBOROUGH.—This was a poſſibility of benefit, to which the aſſignees were entitled as part of the effects of the bankrupt. Nor can they be conſidered as having abandoned their right to it, when its exiſtence had never been notified to them. I think, however, the defendant has a right to deduct ſo much as the plaintiffs muſt have laid out in the payment of arrears, &c., had the policy been regularly delivered up by the bankrupt.

Verdict accordingly.

Park and *Eſpinaſſe* for the plaintiff.

Garrow for the defendant.

[Attornies, *Owen* and *Wild*.]

However, the *poſſibility*, to paſs under the commiſſion, muſt be ſuch as the bankrupt himſelf could have aſſigned or releaſed. Moth *v.* Frome, Ambler, 394. Dommet *v.* Bedford, 6 T. R. 684.

ELIAS MOSS *v.* SMITH, ESQ. AND ANOTHER, LATE SHERIFF OF MIDDLESEX.

Thurſday, December 8.

ACTION for a falſe return of *nulla bona* to a writ of *fi. fa.* againſt the goods of one David Moſs.—The defence was, that before the delivery of the writ to the Sheriff, David Moſs had committed an act of bankruptcy, on which a commiſſion was afterwards ſued out againſt him.

To ſupport a commiſſion of bankrupt, it is ſtill neceſſary ſince the paſſing of ſtat. 46 G. 3. c. 135. (Sir Samuel Romilly's act), that there ſhould have been a good petitioning creditor's debt ſubſiſting when the act of bankruptcy was committed; and it is not ſufficient that the petitioning creditor's debt accrued before the ſuing out of the commiſſion.

On the 8th of December 1807, D. M. who was proved to be a trader, departed from his houſe, leaving no directions where he was to be found, and never returned to it afterwards. The petitioning creditor's debt was for goods ſold upon a credit which did not expire till the 11th of December. On the 25th of the ſame month, ſeveral of D. M.'s creditors called at his houſe for payment of their debts. On the 29th, his goods were ſeized by the Sheriff under the *fi. fa.*; but the execution was withdrawn upon notice of the bankruptcy.

Lord ELLENBOROUGH ſaid the commiſſion could not be ſupported, as there was no debt due to the petitioning creditor when the act of bankruptcy was committed.

Marryat

Marryat contended, that this was cured by the 5th ſection of Sir Samuel Romilly's act, 46 G. 3. c. 135. (*a*).

Lord ELLENBOROUGH.—This is not a caſe protected by that ſection, the object of which was to protect commiſſions which have been regularly ſued out, from being defeated by an act of bankruptcy committed prior to the contracting of the petitioning creditor's debt. But in the preſent caſe, the commiſſion was not regularly ſued out, as there was no legal ſubſiſting petitioning creditor's debt at the time of committing the act of bankruptcy upon which the commiſſion iſſued.

The plaintiff had a verdict.

In the enſuing term, *Marryat* moved for a rule to ſhew cauſe why there ſhould not be a new trial, and ſtrenuouſly inſiſted, that by 46 Geo. 3. c. 135. the commiſſion was not avoided or defeated by reaſon of

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(*a*) Which provides, "that no commiſſion of bankrupt that ſhall be thereafter iſſued, ſhall be avoided or defeated by reaſon of any act of bankruptcy having been committed by the perſon or any of the perſons againſt whom ſuch commiſſion ſhall have iſſued, prior to the contracting the debt of the creditor or any of the creditors upon whoſe petition ſuch commiſſion ſhall have iſſued, if ſuch petitioning creditor had not any notice of ſuch act of bankruptcy at the time when the debt to him was contracted; but that ſuch commiſſion of bankrupt, and all the proceedings under the ſame, ſhall be valid and effectual to all intents and purpoſes, notwithſtanding that ſuch prior act or acts of bankruptcy ſhall have been committed by ſuch bankrupt."

the

the act of bankruptcy having been committed prior to the petitioning creditor's debt becoming due, the intention of the ſtatute being, to render it immaterial in what order the act of bankruptcy and the petitioning creditor's debt aroſe, ſo that both were perfect at the date of the commiſſion.—But upon this point, the Court were unanimouſly againſt him.

Lord ELLENBOROUGH ſaid, the grievance which the ſtatute meant to remedy, was the practice of upſetting commiſſions of bankrupt by unexpectedly proving an act of bankruptcy prior to that relied upon on the part of the aſſignees, as had happened ſo repeatedly in Steel's bankruptcy, and in other inſtances. Such was certainly the intention of thoſe who ſupported the bill when it paſſed through parliament, and this was the natural conſtruction of the clauſe in queſtion. Could it be contended, then, that by a ſort of ſide wind, a new claſs of petitioning creditor's debts was eſtabliſhed, and the bankrupt law ſo materially altered?

The *Attorney General* and *Comyn* for the plaintiff.

Garrow and *Marryat* for the defendant.

[Attornies, *Heward* and *Bell*.]

The notice of inſolvency mentioned in the proviſo to § 1. of the above ſtatute, which renders contracts and tranſactions with the bankrupt after an act of bankruptcy, though more than two months before the date of the commiſſion, void as formerly, means notice of a general inability in the bankrupt to diſcharge his engagements,—not merely notice of ſuch a circumſtance as

his being ſo much preſſed for money as to be obliged to renew his bills.

Anonymous.—Sittings in Tr. vac. 1808. Plaintiff declared as indorſee of a bill of exchange drawn by J. S. payable to his own order. The defence was, that J. S. had committed an act of bankruptcy before the indorſement. In anſwer to this, the plaintiff relied upon Sir S. Romilly's act, 46 Geo. 3. c. 135. § 1.; whereby it is enacted, "that all contracts and tranſactions by and with any bankrupt, *bonâ fide* made or entered into more than two calendar months before the date of the commiſſion, ſhall, notwithſtanding any prior act of bankruptcy committed by ſuch bankrupt, be good; provided the perſon ſo dealing with ſuch bankrupt had not at the time *notice* of any prior act of bankruptcy having been committed by ſuch bankrupt, *or that he was inſolvent*, or had ſtopped payment." It was contended on the part of the defendant, that the plaintiff, at the time when the indorſement was made, had notice that J. S. was *inſolvent*. The fact was, that before then, J. S. had renewed his bills with the plaintiff, and that the bill in queſtion was given in exchange for others, which J. S. could not ſatisfy when due.—But Lord ELLENBOROUGH held, that the inſolvency mentioned in the ſtatute muſt mean a general inability in the bankrupt to anſwer his engagements, which was not to be inferred from his renewing bills of exchange in a particular inſtance; —and the plaintiff had a verdict.

N. In this caſe, the bill was delivered to the indorſee, with the intent of transferring the property in it to him, more than two months before the commiſſion; but the indorſement was not in effect written upon it till within the two months.—Lord ELLENBOROUGH held, that the writing of the indorſement had reference to the delivery of the bill (*a*), and that the caſe was clearly within the ſtatute.

(*a*) Smith v. Pickering, Peak. Caſ. 50. Lempriere v. Paſley, 2 T. R. 485. Wallace v. Hardacre, *ante* 46.

Dist. Jackson v Watson [09] 2KB193

BAKER *v.* BOLTON AND OTHERS.

Same day.

In an action for negligence, whereby the plaintiff's wife was killed, he is not entitled to any damages for the loss of her society, or for his mental sufferings on her account, after the moment of her death.

THIS was an action against the defendants as proprietors of a stage coach, on the top of which the plaintiff and his late wife were travelling from Portsmouth to London, when it was overturned; whereby the plaintiff himself was much bruised, and his wife was so severely hurt, that she died about a month after in an hospital. The declaration, besides other special damage, stated, that "by means of the premises, the plaintiff had wholly lost, and been deprived of the comfort, fellowship and assistance of his said wife, and had from thence hitherto suffered and undergone great grief, vexation and anguish of mind."

It appeared that the plaintiff was much attached to his deceased wife, and that being a publican, she had been of great use to him in conducting his business. —But,

Lord ELLENBOROUGH said, the jury could only take into consideration the bruises which the plaintiff had himself sustained, and the loss of his wife's society and the distress of mind he had suffered on her account, from the time of the accident till the moment of her dissolution. In a civil court, the death of a human being could not be complained of as an injury; and in this case the damages as to the plaintiff's wife must stop with the period of her existence.

Verdict for the plaintiff, with 100*l.* damages.

Park and *Marryat* for the plaintiff.

The *Attorney General* for the defendant.

[Attornies, *Matthews* and *Bevil*.]

Q. If the wife be killed on the ſpot, is this to be conſidered *damnum abſque injuriâ?*

Thurſday, November 8.

REX *v.* PLESTOW.

An indictment for obtaining money by falſe pretences ſtated, that the defendant pretended *he had paid a ſum of money into the Bank of England.* It appeared that he ſaid generally, *the money had been paid into the Bank of England.* Held to be a fatal variance.

THIS was an indictment for obtaining money by falſe pretences.—The indictment charged, that the defendant "did fraudulently produce to one M. Blome, (the ſaid M. Blome being then and there the clerk and ſervant of R. M. &c.) certain, to wit, ſix papers, partly written and partly printed, each of which ſaid papers purported and contained therein, that a bank certificate of the payment of a certain ſum of money therein mentioned into the Bank of England, had been delivered into the office for receiving certificates of payment of the duties on dividends, annuities, &c., which ſaid ſeveral ſums of money amounted together to a large ſum of money, to wit, the ſum of 106*l.*; and did then and there falſely, unlawfully, knowingly and deſignedly, fraudulently

lently and wickedly pretend to the ſaid M. Blome, (the ſaid M. Blome then and there being ſuch clerk and ſervant as aforeſaid,) *that he the ſaid defendant had paid the ſaid laſt mentioned ſum of money into the Bank of England;* whereas, in truth and in fact, the ſaid defendant had not paid into the Bank of England the ſaid laſt mentioned ſum of money, nor any part thereof, as the ſaid defendant did then and there falſely pretend; — by means of which ſaid falſe pretence, defendant obtained 106*l.* of the monies of the ſaid R. M. &c., with intent to defraud them of the ſame."

Blome being called, ſwore that the defendant ſaid to him upon the occaſion referred to in the indictment, "The money *has been paid* at the Bank," not that *he had paid it.*

Lord ELLENBOROUGH intimated an opinion, that this was a fatal variance.

The *Attorney General*, for the proſecution, contended, that the evidence agreed in ſubſtance with the indictment, and that it ſhould be left to the jury to ſay whether the falſe pretence was ſufficiently ſubſtantiated. He begged, that at any rate the point might be ſaved.

Lord ELLENBOROUGH.—In an indictment for obtaining money by falſe pretences, the pretences muſt be diſtinctly ſet out (*a*), and at the trial they muſt be

(*a*) Rex *v.* Maſon, 2 T. R. 581.

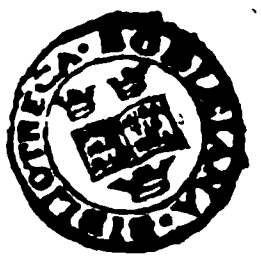
proved as laid. An assertion that money had been paid into the Bank, is very different from an assertion that it had been paid into the Bank by a particular individual. The defendant must be acquitted.

The *Attorney General*, *Garrow*, *Abbott* and *Richardson* for the prosecution.

Gurney and *Alley* for the defendant.

[Attornies, *Leggett* and *Humphreys*.]

Vide East, P. C. Ch. xviii.-§ 13.



ADJOURNED

ADJOURNED SITTINGS IN LONDON.

COVELL *v.* LAMING.

Saturday, December 10.

TRESPASS for running defendant's ſhip againſt plaintiff's in the river Thames.—Plea, *not guilty*.

If the owner of a ſhip, being himſelf on board, and ſtanding at the helm, unintentionally runs her againſt another ſhip, from unſkilful management,—the remedy is *treſpaſs* and not *caſe*.

It appeared, that when the accident happened, the defendant was himſelf on board of his ſhip, and ſtood at the helm; but there was evidence to ſhew, that he wiſhed to ſteer clear of the plaintiff, and that if he was to blame for what had happened, it was only through ignorance and unſkilfulneſs.

The *Attorney General* contended, that the action could not be ſupported, unleſs the jury ſhould believe that the defendant intended to run his veſſel againſt the plaintiff's, and *wilfully* did the act complained of. It is a principle, that where treſpaſs would lie againſt the ſervant, caſe will not lie againſt the maſter. The converſe of the propoſition is equally true, that where caſe would lie againſt the maſter, treſpaſs will not lie againſt the ſervant. But if a ſervant, acting as captain of a ſhip, ſhould, through *negligence* or *ignorance*, run her againſt another ſhip, the owner would be liable to an action on the caſe; therefore, this could not be treſpaſs in the ſervant. And, to conſtitute a treſpaſs,

according to no criterion that has ever been ſuggeſted, does it ſignify any thing, whether the party be a maſter or a ſervant. Thus it is *wilfulneſs* alone that can determine the nature of the act. The caſe of Leame *v.* Bray (*a*), ſeemed to eſtabliſh the diſtinction, that where the injury is immediate from a forcible act of the defendant, the remedy is treſpaſs, and that caſe is never proper except where the injury is conſequential; but the doctrine there laid down, had been ſince much doubted by the Court of Common Pleas (*b*).

Lord ELLENBOROUGH.—I know there is a difference of opinion upon this ſubject. I have had much communication concerning it with thoſe whom I reſpect very highly; but I confeſs, I have not been able to perceive the grounds of their difficulties. My own opinion has always been uniform. Whether the injury complained of ariſes directly, or follows conſequentially, from the act of the defendant,—I conſider as the only juſt and intelligible criterion of treſpaſs and caſe. If, in the dark, I ignorantly ride againſt another man on horſeback, this is undoubtedly treſpaſs, although I was not aware of his preſence till we came into contact. It makes no difference that here the parties were ſailing on ſhip board. The defendant was at the helm, and guided the motions of his veſſel. The winds and the waves were only inſtrumental in carrying her along in the direction which he communicated. The force, therefore, proceeded from him,

(*a*) 3 Eaſt, 593. (*b*) Rogers *v.* Imbleton, 2 N. R. 119.

and

and the injury which the plaintiff ſuſtained was the immediate effect of that force.

The plaintiff had a verdict.

Garrow, *Park* and *Marryat* for the plaintiff.

The *Attorney General* and *Pitcairn* for the defendant.

[Attornies, *Gale* and *Barnes*.]

In Huggett v. Montgomery, 2 N. R. 446, the court of C. P. held, that if a ſhip, while the owner is on board, runs againſt another, by the negligence of the pilot, treſpaſs will not lie, and the only remedy is an action on the caſe. They laid conſiderable ſtreſs upon the circumſtance that the defendant, though on board, had not the direction of the veſſel when the accident happened, which diſtinguiſhed the caſe from *Leame* v. *Bray*; but they again queſtioned the authority of that deciſion. *Vide* Day v. Edwards, 5 T. R. 648. Savignac v. Roome, 6 T. R. 125. Ogle v. Barnes, 8 T. R. 188. Mac-Manus v. Cricket, 1 Eaſt, 106. Morley v. Gainsford, 2 H. Bl. 442.

ISRAEL v. ISRAEL.

Friday, Dec.

ASSUMPSIT for money lent, and an account ſtated.—Plea, the general iſſue.

A written paper containing a bare acknowledgment of a debt, is good evidence under the money counts, without a ſtamp.

It appeared, that in July laſt, a ſettlement of accounts took place between the parties, when the de-

fendant, who is ſon to the plaintiff, gave him an unſtamped ſlip of paper, with the following words written upon it in his own hand:—"I owe my father four hundred and ſeventy pounds. *Jas. Iſrael.*" This was now offered in evidence as proof of a debt to that amount.

The *Attorney General* objected, that it was to be conſidered either as a promiſſory note, or a receipt, and that in neither caſe was it receivable without a ſtamp.

Garrow and *Lawes*, on the other ſide, contended that it was merely an acknowledgment by the defendant, that upon a ſettlement of accounts, ſuch a balance was due to the plaintiff; and they cited the caſe of *Fiſher* v. *Leſlie*, 1 *Eſp. N. P. Caſ.* 426, in which it had been held by EYRE, C. J., that an I. O. U. was good evidence under the money counts, without a ſtamp.

Lord ELLENBOROUGH.—I entertained ſome doubts whether this paper ought not to have been ſtamped as a promiſſory note; but upon the authority of that caſe, I will receive it in evidence though unſtamped.

The plaintiff had a verdict.

Garrow and *Lawes* for the plaintiff.

The *Attorney General* for the defendant,

[Attornies, *Williamſon* and *Harris*.]

In

In Grey *v.* Harris, C. P. Sittings after E. T. 1800, Lord Eldon, C. J. is ſaid to have held, that an *I. O. U.* could not be received in evidence without a ſtamp, being a promiſſory note, though not negotiable. Chitty on Bills, 2d ed. 243. *in notis.*

WALLER *v.* HORSFALL.

Same day.

THIS was an action for money had and received, to recover back the ſum of 20*l.* paid by the plaintiff to the defendant for the aſſignment of a leaſe which had been previouſly forfeited.

If there are two parts of a written agreement, both executed at the ſame time, but the one ſtamped and the other unſtamped, the unſtamped part is receivable as ſecondary evidence of the contents of the ſtamped part.

The plaintiff proved that the defendant was in poſſeſſion of a ſtamped agreement upon this ſubject, and had received notice to produce it. The defendant not producing it, the plaintiff, by way of ſecondary evidence, tendered another part of the agreement unſtamped, which had been executed by both parties at the ſame time with the former, and delivered to the plaintiff.

The *Attorney General* objected, that this paper could not be received in evidence for want of a ſtamp. It had been delivered to the plaintiff as a ſubſtantive, binding agreement, and if ſtamped it would operate as ſuch. Therefore, being evidence of the contract, and

obligatory upon the parties, it clearly came within the words and meaning of the ſtatute (*a*).

Lord ELLENBOROUGH.—The agreement in the hands of the defendant not being produced, it is open to the plaintiff to give parol evidence of its contents, or to produce a copy of it; and this I think may be received as a copy, though, if properly ſtamped, it might be uſed as an original. There can be no doubt, that if it never had been ſigned by the parties, it would have been receivable; and I do not ſee how it is vitiated by their names being affixed to it. It is offered, not as the agreement obligatory upon the parties, or as direct evidence of the contract; but as evidence of the contents of the paper-writing in the hands of the defendant, which has been ſtamped as the law requires.

The witneſs who had ſtated the writing produced to be a copy of the other, being further interrogated, ſaid he had himſelf copied both from the draft, and that he believed they were correct.

The *Attorney General* then contended, that the *draft* ſhould have been produced as the beſt ſecondary evidence, ſince the one part of the agreement was not copied from the other.

(*a*) By 23 G. 3. c. 58. § 1. a ſtamp duty, encreaſed by ſubſequent ſtatutes, is impoſed "on "every ſkin or piece of vellum, "&c. upon which any agree-"ment ſhall be written or print-"ed, whether the ſame ſhall on-"ly be evidence of the contract, "or obligatory upon the parties, "from its being a written inſtru-"ment."

Lord ELLENBOROUGH.—If they are both copies of the draft, they muſt be copies of each other. They were copied by the ſame perſon, who believes them to be correct. It is requiſite that the copy produced as ſecondary evidence ſhould be a copy *of* the original, not *from* the original.

The plaintiff afterwards failed upon a collateral point, and ſubmitted to be nonſuited,

Park and *Comyn* for the plaintiff.

The *Attorney General* for the defendant.

[Attornies, *Howard* and *Chapman*.]

VALLANCE *v.* DEWAR. Friday, Dec. 16.

THIS was an action on a policy of inſurance on the ſhip Courier, and her freight and cargo, "loſt or not loſt, at and from any port or ports in Newfoundland to one port of diſcharge in Portugal, or to any port or ports in the United Kingdom."

According to the uſage of the Newfoundland trade, when ſhips arrive on the coaſt they are either employed for ſome time in fiſhing (called *banking*) or they make an intermediate voyage in the American ſeas, before beginning to take in their homeward cargo, during which they are protected by a ſeparate policy. Therefore, in effecting a policy, "*loſt or not loſt at and from Newfoundland to a port in Europe*," although the ſhip is to be employed in *banking*, it is not neceſſary to diſcloſe the fact to the underwriters, as their riſk only commences from the time when the *banking* or intermediate voyage ends, and they are bound to know the nature and circumſtances of the branch of trade to which the policy relates.—If the uſage is general, it makes no difference for this purpoſe, that it is not uniform.

The policy was effected on the 28th of Auguſt 1807. The Courier arrived at Newfoundland in June, and was employed till the 13th of October in *banking*,

or

or fiſhing on the banks of that coaſt. She then began to take in her homeward bound cargo, and ſhe ſailed for England the 22d of December, but ſoon after foundered in a gale of wind.

The defence was, that the underwriters had not been informed that the ſhip was to be employed in *banking* while at Newfoundland; and that by the banking their riſk was greatly increaſed, as the policy being "loſt or not loſt, at and from," attached immediately upon the ſhip's arrival at Newfoundland; and even if it did not, from the delay occaſioned by the banking, the voyage home was turned from a ſummer into a winter one.

The *Attorney General*, for the plaintiff, ſaid he ſhould give a complete anſwer to this defence by ſhewing, that according to the eſtabliſhed uſage of the Newfoundland trade, ſhips after their arrival upon the coaſt are either employed in *banking*, or take an intermediate voyage to Quebec or ſome of the adjacent ſettlements, before they begin to take in their homeward cargo, and that during the banking or intermediate voyage they are covered by a ſeparate and diſtinct policy. Of this as of every other uſage of trade, the underwriters were bound to take notice. Thus in *Noble* v. *Kennoway*, Doug. 510, where the policy was on goods on board two ſhips from this country to Labrador, *until the goods ſhould be there diſcharged and ſafely landed*, and the ſhips upon their arrival, inſtead of unloading their cargoes, were employed in fiſhing for nearly two months after, at the end of which time they were captured by an American privateer

privateer with the goods on board, it was held that the underwriters were liable, the uſage in this trade being for ſhips to unload their cargoes (conſiſting chiefly of ſalt and proviſions), gradually as they are wanted for curing the fiſh, and for conſumption. Lord Manſfield there ſaid, "every underwriter is preſumed to be acquainted with the practice of the trade he inſures, and if he does not know it, he ought to inform himſelf." The ſame doctrine had been laid down by Lord Eldon, while C. J. of the Common Pleas, in a caſe which ſtill more nearly reſembles the preſent (*a*). Therefore

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(*a*) *Ougier* v. *Jennings*. C.P. Sittings at Guildhall after E.T. 1800. Cor. Lord ELDON, C. J.

Action on a policy of inſurance on fiſh by the ſhip Ducheſs of Gordon, at and from Newfoundland to a port in Portugal. The ſhip carried out a cargo of ſalt from Liſbon, with which ſhe arrived at Newfoundland on the 21ſt July. As ſoon as ſhe was unloaded ſhe proceeded in ballaſt to *Sidney*, where ſhe arrived on the 25th Auguſt, and took in a cargo of coals. This ſhe carried back to Newfoundland, and delivered there in the beginning of October. Between the 21ſt of that month and the 8th of November, ſhe was loaded with the cargo of fiſh, which was the ſubject of the inſurance, and ſoon after ſailed with convoy for Oporto, but was totally loſt in the courſe of the voyage. — The defence was, that the trip to Sidney had not been communicated to the underwriters, although a material circumſtance, as tending to retard the voyage inſured and to encreaſe the riſk. — The plaintiff relied upon the uſage of the trade, which was proved by ſeveral witneſſes.

Lord ELDON.—The policy is "at and from Newfoundland to Portugal, upon goods, beginning the adventure from the *loading thereof*." It is not from the arrival of the ſhip, but from her beginning to load. I think the practice of the trade in this caſe is as capable of being received in evidence as the practice in other caſes in which it has been admitted This is like the caſe of the ſhip that was employed on the Labrador coaſt, where ſhe fiſhed after her

Therefore if the uſage was eſtabliſhed, it followed that there was no occaſion on the part of the aſſured to make any diſcloſure concerning the *banking*, and that the loſs having happened on the homeward bound voyage, there could be no defence to the action.

Several witneſſes long acquainted with the Newfoundland trade were called, who proved the uſage to be as above ſtated, and that a policy of this ſort was underſtood to attach when the ſhip begins to take in her homeward bound cargo. They added that fiſh of a former ſeaſon were ſometimes found ready cured upon the arrival of the ſhips at Newfoundland, ſo that a cargo might be immediately procured.

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her arrival and before her outward cargo was diſcharged *. There is no doubt that the policy *prima facie* means the firſt cargo which ſhall be laden after the ſhip's arrival, but the underwriter muſt refer himſelf to the uſage of the trade, which he is bound to know. The firſt queſtion will be, whether there is ſuch an uſage here? If the evidence leads to this, that the ſhip may make an intermediate voyage of ſeveral years, it is too dangerous for you to give it effect. If ſeveral ſhips belonging to a merchant arrive together at Newfoundland, and finding cargoes for ſome only, he *bonâ fide* ſends the reſt on an intermediate voyage, it ſeems reaſonable; though ſtudiouſly ſending a ſhip on an intermediate voyage out of her turn would be a deviation. The ſecond queſtion, is whether this ſhip has been employed otherwiſe than the uſage warrants? If you think the uſage does exiſt, if you think it reaſonable, and if you think this ſhip acted *bonâ fide* in taking the intermediate voyage, you will find for the plaintiff,—if not, you will find for the defendant.

The jury found a verdict for the plaintiff, and no attempt was made to ſet it aſide.

* Noble *v.* Kennoway, Doug. 510.

Park

Park ſtill contended that the policy attached immediately upon the termination of the outward bound voyage. This muſt be underſtood to be the intention of the parties from the words *loſt or not loſt* ſtanding in the policy, although it was effected on the 28th of Auguſt. The caſe of Noble *v.* Kennoway was in point to ſhew that the policy on the outward and that on the homeward voyage were underſtood to cover all riſks on theſe adventures from the ſailing of the ſhips from England till their final return; and in Ougier *v.* Jennings, the inſurance being on fiſh only, the moment when the policy attached was neceſſarily aſcertained to be from the beginning to load. A policy upon a *ſhip* AT and from a place muſt attach, upon her firſt being moored there in good ſafety. Uſage could not controul words ſo explicit. But the uſage ſet up did not appear uniform, which it muſt be to have the effect aſcribed to it; for as often as a ſhip could procure a cargo upon her arrival at Newfoundland, there could be no doubt that ſhe would prefer returning direct to Europe, inſtead of taking an intermediate trip in America. The underwriters, therefore, had reaſon to ſuppoſe their riſk would commence in June; and as the ſhip was employed in banking till October ſhe had been guilty of a deviation, and they were diſcharged from all reſponſibility.

Lord ELLENBOROUGH. — The rule is, that the broker muſt communicate what is in the ſpecial knowledge of the aſſured, not what is in the middle between them and the underwriters. He is not bound to make a laborious diſcloſure of what is known to all. Is it notorious, then, that ſhips in this trade, upon their arrival

arrival at Newfoundland are either employed in banking, or take an intermediate voyage? If ſo, it muſt be preſumed to be equally in the knowledge of both parties. According to the general import of the words "*at and from*," the policy would attach upon the ſhip's firſt mooring in a harbour on the coaſt; but it doubtleſs may be explained differently by uſage; and as between theſe parties, the policy muſt be taken to be the ſame as if it had been expreſſed to attach upon the expiration of the banking or intermediate voyage. The underwriters were not liable for any antecedent loſs, and cannot complain of what was previouſly done as a deviation. — Although there ſhould be exceptions as to the uſage, that would be immaterial. Things are preſumed to go on in their ordinary courſe; and if an uſage be general, though not uniform, the underwriters are bound to take notice of it.

Verdict for the plaintiff.

The *Attorney General* and *Gaſelee* for the plaintiff.

Park and *Scarlett* for the defendant.

[Attornies, *Gregſon & Dixon* and *Smith & Trower*.]

Kingſton *v.* Knibbs, Sittings after M. T, 49 G. III.

Action on policy on ſhip, at and from Oporto to London.— The ſhip having taken in a part of her cargo withinſide the bar of Oporto, went outſide to take in the remainder, when ſhe was drven out to ſea in a gale of wind and captured.—The defence was, that the underwriters had not been informed ſhe was to

to take in any part of her cargo outside the bar. But several witnesses stated, that it is usual for vessels to do so at Oporto, when, from the state of the river, they cannot conveniently load entirely within side the bar. And though it appeared that in policies "*at and from Oporto*," liberty is some times expresly given to load on either side the bar; — Lord ELLENBOROUGH held, that the underwriters were bound, of themselves, to take notice of the usage; and the plaintiff had a verdict.

Vide Pelly *v.* Royal Ex. Ass. 1 Burr. 341. — Tierney *v.* Etherington, *Ib.* 348. — Lyons *v.* Bridge, Doug. 512. — Hoskins *v.* Pickersgill, Marsh. 727.

JOSEPH BARNARD, THE YOUNGER, *v.* PALMER AND ANOTHER, ASSIGNEES OF JOHN LOCHART BARNARD, A BANKRUPT.

Saturday, Dec. 17.

TROVER for various articles of household furniture seized by the defendants as part of the effects of J. L. Barnard at the time he became bankrupt.

The plaintiff claimed under a bill of sale executed to him by the sheriff of Middlesex.

On the 18th of June 1806, the bankrupt executed a warrant of attorney to his father for 5000*l.*, upon which judgment was entered up the following day. On the 7th of November following the goods in the bankrupt's house were taken in execution under an *alias fi. fa.* upon the judgment, and the sheriff's officer remained in possession till the 28th of that month,

The lying in prison two months, by 21 Jac. I. c. 19. § 2. made an act of bankruptcy, means two months of actual, uninterrupted imprisonment. Therefore where a trader was arrested for debt on the 4th of November, but allowed to go at large till the 8th, when he returned into custody, and being afterwards moved into the King's Bench prison, lay there upwards of two months,—Held, that the act of bankruptcy which he thus committed, had reference only to the 8th when he returned into custody, not to the 4th when the original arrest took place.

when the bill of ſale was executed to the plaintiff.—The queſtion was, whether this execution was overreached by the act of bankruptcy,—which conſiſted in lying two months in priſon.

The bankrupt was arreſted on the 4th of November, but was allowed by the bailiff to go at large till the 8th. On that day he returned into cuſtody, and on the 10th he was moved by *habeas corpus* into the King's Bench priſon, where he remained ſeveral months.

Park, for the defendants, contended, that according to the true conſtruction of 21 Jac. I. c. 19. § 2. (*a*) the impriſonment in this caſe had reference to the 4th of November, ſo as to make a complete act of bankruptcy on that day. The principle upon which lying in priſon conſtitutes an act of bankruptcy is, that it affords proof of inſolvency; and this appears as fully from a perſon ſurrendering himſelf without being able to procure bail as if he had always remained in cuſtody. Although a perſon arreſted be permitted to go at large before the return of the writ, this is at the peril of the ſheriff, and if his body be brought in at the return of the writ, in contemplation of law, he has been in the cuſtody of the ſheriff, and conſequently in priſon, from the moment of the arreſt. The caſe of *Roſs* v. *Green*, 1 Burr. 437, was expreſsly in

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(*a*) The words are "or being arreſted for debt, ſhall, after his or her arreſt, *lie in priſon two months or more*, upon that or any other arreſt or detention in priſon for debt."

point.

point. There the bankrupt having been arreſted in Kent on the 31ſt of March, was on the 8th of May following brought by *habeas corpus* to be turned over, and on the road to the judge's chambers was permitted to call at his attorney's houſe, which was out of the county of Kent; from whence he was carried directly to a Judge's chambers to be bailed, and was bailed accordingly; but was immediately ſurrendered by his bail in their own diſcharge, and thereupon committed to the King's Bench priſon, where he lay till the 15th of July. Lord MANSFIELD and the other Judges of the King's Bench held, that the act of bankruptcy had relation to the original arreſt, and was committed on the 31ſt day of March.

Lord ELLENBOROUGH.—In that caſe there was an unbroken impriſonment from the time of the arreſt, and the court conſidered the bailing as mere form to turn the bankrupt over from one cuſtody to another. Here there is no commencement of the impriſonment till the 8th, unleſs you conſider the officer laying his hand upon the bankrupt an impriſoning. He was immediately after at liberty to go where he choſe, and he continued a freeman until after the execution was levied upon his goods. I muſt look to the words of the ſtatute, and I am clear that the legiſlature intended that the two months ſhould run only from the time of the party lying in priſon, and not from the arreſt, if there is not a continuous impriſonment from the moment when that happens. —I am of opinion that the execution in this caſe on the 7th of November is unimpeachable, and that

the goods therefore, did not pass under the commission to the defendants.

The plaintiff had a verdict.

The *Attorney General*, *Garrow* and *Holroyd* for the plaintiff.

Park, *Jervis* and *Runnington* for the defendant.

[Attornies, *Wesions* and *Clarkson*.]

In Came v. Coleman, 1 Salk. 109. it is said that by 21 Jac. 1. c. 19. the act of bankruptcy is from the first arrest of the bankrupt. *Et per* Cur. That is and must be taken, from the time of the first arrest, *upon which he lies in prison.* Tribe v. Webber, Bul. N. P. 38. S. P.

If A. claiming goods under a fradulent bill of sale from B., brings trover against C. for taking them in execution as belonging to B., C. must prove the judgment against B. although the sale from B. to A. was merely colourable and void as against creditors.

Steel v. *Brown and another.* Sittings in M. T. 49 G. III.

Trover for various articles of household furniture, which the defendants had taken in execution under a judgment against one *Cockburn*, and which the plaintiff claimed to be entitled to under a bill of sale from the same person. The plaintiff proved the execution of the bill of sale for a valuable consideration, and the seizing of the goods The defendants' case was, that the bill of sale was fradulent and void, there having been no change of possession; but they were not prepared to prove the judgment under which they had taken the goods in execution. — Sir James Mansfield, C. J. held, that without this they could not impeach the title transferred by the bill of sale, and the plaintiff had a verdict.

PHILLIMORE AND OTHERS *v.* BARRY AND ANOTHER.

Same day.

THIS was an action for goods ſold, to recover the price of 13 puncheons of rum.

Where goods were ſold by auction to an agent, the auctioneer wrote the initials of the agent's name, together with the prices, oppoſite the lots purchaſed by him, in the printed catalogue; and the principal afterwards, in a letter to the agent, recognized the purchaſe. Held, that the entry in the catalogue, and the letter, coupled together, were a ſufficient memorandum of the contract within the ſtatute of frauds. If goods are ſold, to be paid for in 30 days, and if not carried away at the end of that time, warehouſe rent to be paid for them,—the property in the goods veſts abſolutely in the purchaſer, and they remain at his riſk, from the moment of the ſale.

The cargo of a Daniſh prize, of which the rum in queſtion formed a part, was lodged in the warehouſes of Meſſrs. Fector and Minet at Dover, and was ſold by auction in various lots, on the 28th of April 1808. By the conditions of ſale, a depoſit of 25 per cent. was to be paid immediately, and the remainder of the purchaſe money in 30 days. At the end of that time, the purchaſers were to carry away the goods, or were afterwards to pay warehouſe rent. Before the day of ſale, the defendants had written to Meſſrs. Fector and Minet to buy 13 puncheons of this prize rum for them. Accordingly, Mr. John Minet Fector, one of that firm, bid for ſeveral lots, which were knocked down to him, and amounted to the quantity required. The auctioneer, oppoſite to each of theſe lots, wrote down in his printed catalogue the price for which they ſold, and the initials I. M. F. meaning, *John Minet Fector*. On the 11th of May, the defendants wrote a letter to Meſſrs. Fector and Minet, recognizing and approving of this purchaſe. But on the 18th of the ſame month, the warehouſes in which the rum was, accidentally caught fire, and by means of a quantity of gunpowder lodged in them, were blown into the air

with a tremendous explosion.—There was no evidence of the deposit being paid.

Garrow, for the defendants, stated two grounds on which, he contended, his clients were not liable. 1. The contract was void under the statute of frauds. The only way in which it could be pretended the 17th section had been satisfied was, by a memorandum in writing. But it would be difficult to say, that under the circumstances of this case, the auctioneer was the authorized agent of the defendants; and even if he were, writing the letters I. M. F. in the printed catalogue could not be considered as any memorandum of the contract between the parties. 2. Until the expiration of the 30 days, the goods remained at the risk of the sellers. They were not to be paid for or delivered before then, and the property did not absolutely vest in the purchaser. The stipulation as to the paying of warehouse rent afterwards, shewed, that till that time the goods were still considered as belonging to the vendors, subject to the right of the purchaser upon fulfilling his part of the contract.—But

Lord ELLENBOROUGH held, that the initials of the defendants' agent written by the auctioneer in the catalogue, coupled with their letter recognizing the sale, constituted a sufficient memorandum in writing to satisfy the statute of frauds (*a*); and that the property

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(*a*) Saunderson *v.* Jackson, 2 B. & P. 238. Egerton *v.* Matthews, 6 East, 307. Champion *v.* Plummer, 1 N. R. 252.

vested

veſted abſolutely in the purchaſers from the moment of the ſale, the agreement to give ſtowage room to the goods free of expence for 30 days, being introduced for their benefit, and being part of the conſideration for which the purchaſe money was to be paid (*a*).

Verdict for the plaintiffs.

The *Attorney General* and *Carr* for the plaintiffs.

Garrow and *Puller* for the defendants.

[Attornies, *Gregg & Corfield* and *Haynes*.]

(*a*) Hanſon *v.* Meyer, 6 Eaſt, 614. Hinde *v.* Whitehouſe, 7 Eaſt, 558.

HARMOND *v.* PEARSON.

Same day.

The owner of a veſſel ſunk in a navigable river, is bound to place *a buoy* over the wreck, and it is not enough to ſtation a watchman near the ſpot to point out the danger.

THIS was an action upon the caſe againſt the defendant for neglecting to place a buoy over his lighter, which had been ſunk in the river Thames; whereby the plaintiff's barge had ſtruck againſt the lighter, and been greatly damaged.

The only queſtion was, whether due notice had been given of the danger ariſing from the wreck of the lighter? No buoy was placed over it till two or

three days after the lighter had been ſunk. In the mean time, a watchman was placed near the ſpot, to warn veſſels of all deſcriptions to avoid it. While this man was on duty, the barge in queſtion approached for the purpoſe of mooring there. He deſired the people on board to keep off; but they diſregarded his admonition, and much abuſive language was interchanged between the parties. Upon the falling of the tide, the barge ſuffered the damage complained of.

Garrow, for the defendant, contended, that no particular form of notice was neceſſary in ſuch a caſe, and that the defendant could not be liable for the conſequences of an accident which had happened from the plaintiff's ſervants neglecting the warning which they had received.

Lord ELLENBOROUGH.—It is a peremptory law of navigation, that when any ſubſtance is ſunk in a navigable river, ſo as to create danger, a buoy ſhall be placed over it for the ſafety of the public. This is the proper and ſpecific notice, which all underſtand and are bound to attend to. A verbal communication may eaſily be miſunderſtood, and is very likely (as in the preſent caſe) to lead to confuſion and miſchief. But it is of the utmoſt importance to the property and the lives of His Majeſty's ſubjects that ſuch a warning ſhould be given as will neceſſarily inform every one engaged in the navigation of the river, of the exiſtence of the danger. The defendant is certainly anſwerable for the conſequences of his not cauſing a buoy to be placed

placed over the wreck of the lighter as ſoon as poſſible after it was ſunk in the Thames.

Verdict for the plaintiff.

Park and *Eſpinaſſe* for the plaintiff.

Garrow and *Marryat* for the defendant.

[Attornies, *Harriſon* and *Eyre*.]

If a ſhip is ſunk in a navigable river by misfortune or inevitable accident, and without any fault on the part of the owner, he is not liable to an indictment for not removing the wreck. Per Lord KENYON, Rex *v.* Watts, 2 Eſp. N. P. Caſ. 675. The law does not ſeem to have very ſpecifically pointed out the manner in which this ſpecies of *high way* is to be kept *in repair*. However, it is laid down in *Hawkins*, "that if a river be ſtopped, to the nuiſance of the country, and none appear bound by preſcription to clear it, thoſe who have the piſcary, and the neighbouring towns, who have a common paſſage and eaſement therein, may be compelled to do it." 1 H. P. C. ch. 75. § 13.

If an individual has a right of fiſhery in a navigable river, it is ſubject to the right of the public to uſe the river for all the purpoſes of navigation.

Anonymous.—Durham Aſſizes, 1808, Cor. WOOD, B.

—Action for diſturbing plaintiff's fiſhery in the river Tweed.

—It was proved that defendant's ſhip was moored againſt a rock on the bank of the river, where ſhe delivered her cargo, and that plaintiff was prevented by the ſituation of the ſhip from taking ſo many fiſh as he would otherwiſe have done. It further appeared, that ſhips frequently lay there, waiting for a wind, and that there were mooring rings upon the rock, to one of which the ſhip in queſtion was faſtened.

WOOD, B.—A navigable river is a public highway, and all perſons have a right to come there in ſhips, and to unload, moor and ſtay there as long as they pleaſe. Nevertheleſs, if they abuſe that right ſo as to work a private injury, they are liable to an action. The queſtion will therefore be, whether the defendant has abuſed his right? The privilege of whether

the plaintiff muſt be ſubſervient to the right of the public. It would be of very miſchievous conſcquences if the owner of a fiſhery could preſcribe to the public how and where they are to moor in a navigable river. The only caſe I remember like this, was where a man obſtinately refuſed to move his ſhip from oppoſite a wharf, although it would have been juſt the ſame if he had moved a little one way or the other; and therefore he abuſed his right, and the plaintiff recovered. The defendant had a right to moor and remain where his ſhip lay, as long as convenience required. Yet, if he acted wantonly and maliciouſly for the purpoſe of injuring the fiſhery, the plaintiff is entitled to a verdict, but not otherwiſe.

Wedneſday, Dec. 21.

KINGSTON *v.* M'INTOSH.

In an action on a policy of inſurance, the plaintiff cannot recover intereſt upon the ſum inſured.

THIS was an action upon a policy of inſurance, and the only queſtion was, whether the plaintiff could be allowed intereſt?

Lord ELLENBOROUGH.—No intereſt can be given in ſuch a caſe here; although in other places, proceeding upon grounds which I do not preſume to controvert, they do give intereſt (*a*). But I cannot

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(*a*) When judgment is affirmed on a writ of error in K. B., that court, on motion, will order the maſter to compute intereſt on the ſum recovered, from the day of ſigning final judgment below, down to the time of affirmance. 2 Tidd's Practice, 4th ed. 1099. In the Exchequer Chamber, it is entirely diſcretionary with them to allow intereſt or not, 2 H. Bl 284; and they ſeem to be guided by the conſideration, whether in the particular caſe before them, the plaintiff below, from the nature of his demand, was entitled to recover intereſt by the verdict; as they allow intereſt on bills of exchange, 2 N. R. 205, and refuſe it on an attorney's bill, 2 B. & P. 219.

adviſe

adviſe a jury to allow intereſt upon a policy of inſurance, more than upon book debts and in all other caſes where a ſum of money is found to be due from the defendant to the plaintiff. I dare not uſurp a power which the legiſlature has not conferred upon me, and which has not been exerciſed by my predeceſſors. I muſt act upon the law as it ſtands. Whether it be right or wrong, I cannot take upon me to change it. Had the money been payable at a certain day, the plaintiff would have been entitled to intereſt; but upon ſuch a debt as this, I am of opinion that he is not. I have conſidered the ſubject maturely; and if I am miſtaken, I ſhall be glad to be ſet right.

Verdict for the ſum underwritten.

The *Attorney General*, *Garrow* and *Taddy* for the plaintiff.

Beſt, Serjeant, *Marryat* and *Carr* for the defendant.

[Attornies, *Kaye & Forſhfield*, and *Gregg & Corfield*.]

Vide De Havilland *v.* Bowerbank, *ante* 50.

FORBES

Thurſday, Dec. 22.

FORBES *v.* COWIE.

The owner of a ſhip ſent her to St. Domingo, with a cargo to be bartered for goods there, which ſhe was to bring back to England. When a ſmall part of the outward cargo had been unloaded, and bartered for goods which were put on board, the ſhip was loſt; but the remainder of the outward cargo was ſaved, and bartered for other goods, which would have formed a ſufficient cargo for the ſhip, if ſhe could have performed the homeward voyage. Held, that the underwriters on a policy on the ſhip's freight, *at and from St. Domingo*, were only liable for the freight of the homeward goods that were on board when the ſhip periſhed.

THIS was an action on a policy of inſurance on the freight of the *Chiſwick*, at and from any port or ports of Hayti (St. Domingo) to Liverpool.

The ſhip arrived at St. Domingo on the 4th of July laſt, with a cargo, the property of the plaintiff, to be bartered for goods, the produce of St. Domingo, which were to be brought home by the Chiſwick to Liverpool. Part of the outward cargo was bartered accordingly for 55 bales of cotton. Theſe were put on board the ſhip. The remainder of the outward cargo ſtill remained on board on the 15th of July, when ſhe was wrecked. A conſiderable part of the outward cargo, however, was ſaved, and in 12 days after was exchanged for 250 tons of coffee and 100 tons of wood, the freight of which would have been of a larger value than the ſum inſured, if the ſhip had not been loſt. The defendant ſettled for the freight of the 55 bales of cotton; and the queſtion was, whether he was further liable?

The *Attorney General* and *Marſhall*, Serjeant, for the plaintiff, contended, that here the outward and homeward voyage formed one adventure, and that there exiſted an inchoate right to the whole of the freight inſured at the time when the loſs happened. They cited as in point *Horncaſtle* v. *Suart*, 7 Eaſt, 400, where it was held, that an inſurance by the owner of

a ſhip chartered on a voyage from London to Dominica and back to London, *at and from Dominica to London*, attached while the ſhip lay at Dominica delivering her outward cargo, and before any part of the homeward cargo was ſhipped, during which time ſhe was captured by the enemy. Here part of the homeward cargo had been loaded, and the only other difference between the two caſes was, that the plaintiff had not chartered his ſhip; but the charterparty being *res inter alios acta*, could not be the foundation of the former deciſion. The policy on freight could not be affected by the ſhip being uſed by the owner, or hired to another perſon.

Lord ELLENBOROUGH.—I am more diſpoſed to doubt the authority of *Horncaſtle* v. *Suart*, than to think that the underwriter is liable in the preſent caſe. *There*, however, there was one charterparty for the outward and homeward voyage, and the freight was entire. That is the only ground upon which the deciſion can be ſuſtained. Here I can entertain no doubt. The underwriter does not inſure that the ſhip ſhall have a freight, but only that the owner ſhall be indemnified for the loſs of the freight of goods put on board. What goods were on board when the ſhip was loſt? The outward goods. They were not to be brought home on freight; they were to be bartered at St. Domingo. They were the means by which the homeward cargo was to be procured. How then has the plaintiff been damnified upon the ſubject matter of this inſurance? By loſing the freight of the 55 bales of cotton; and that he has been already paid by the defendant.

Plaintiff nonſuited.

In

In the enſuing term, the court of K. B. refuſed a rule to ſhew cauſe why this nonſuit ſhould not be ſet aſide. Lord ELLENBOROUGH aſked, whether, if there had been a bag of money on board, to purchaſe a homeward cargo, when the loſs happened, this would have been freight? and whether it was poſſible to draw a diſtinction between goods to be bartered for a cargo, and ſpecie to pay for one?—The other Judges concurred, and expreſſed an opinion that the caſes upon this ſubject ought by no means to receive any extenſion.

The *Attorney General*, *Garrow*, *Marſhall*, Serjeant, and *Scarlett* for the plaintiff.

Park and *Richardſon* for the defendant.

[Attornies, *Windle* and *Dennett*.]

Vide Tonge *v.* Watts, 2 Stra. 1251. Montgomery *v.* Eggington, 3 T. R. 362. Thompſon *v.* Taylor, 6. T. R. 478.

COMBER *v.* ANDERSON, BART. AND ANOTHER.

Thurſday, Dec. 22.

If a merchant orders an inſurance broker to effect a policy of inſurance for him on a cargo of corn, without giving any directions as to thoſe with whom the policy is to be effected, and the inſurance broker effects the policy with one of the chartered companies, by whoſe policies corn is warranted againſt partial loſſes, although the ſhip be ſtranded;—upon a large partial loſs happening upon this cargo after a ſtranding of the ſhip, the merchant cannot maintain an action againſt the inſurance broker for not effecting the policy with private underwriters, who, by the common form of a policy of inſurance, would have been liable for this partial loſs.

THIS was an action againſt the defendants for negligence as inſurance brokers, reſpecting a cargo of wheat, which the plaintiff had bought at Waterford, to be conveyed by the ſhip Fanny from thence to Liverpool. One count, after ſtating that the defendants were retained to effect an inſurance on the cargo, "for the effectual protection and indemnity of the plaintiff in that behalf," and that it was the duty of the defendants to have cauſed ſuch a policy of inſurance to be effected upon the wheat as would have indemnified the plaintiff from any *partial loſs* that ſhould or might ariſe in the event of the ſhip being ſtranded, —complained, that the defendants did not effect ſuch a policy of inſurance, but cauſed a certain policy of inſurance to be effected for the plaintiff, and to be ſealed with the common ſeal of the corporation of *The Royal Exchange Aſſurance*, in which policy the inſurance was declared to be "free from all average upon corn, unleſs general or otherwiſe ſpecially agreed," and that the defendants neglected to make, or cauſe to be made, any ſpecial agreement in that behalf; whereby, although the ſhip was afterwards ſtranded on her voyage to Liverpool, and an average or partial loſs of 95*l.* per cent. accrued upon the wheat, the plaintiff was prevented from recovering the ſaid loſs, or any part thereof.

It appeared that the plaintiff had not given the defendants any ſpecial directions concerning the inſurance of this cargo, and that he did not complain of the policy having been effected with the Royal Exchange Aſſurance Co. till ſome time after the loſs happened.

Garrow, however, contended, that the defendants were bound to have effected the inſurance in the uſual manner; that by all policies underwritten, except thoſe of the chartered companies, the underwriters are liable for an average loſs upon corn if the ſhip be ſtranded; that the voyage from Waterford to Liverpool being in the nature of a coaſting voyage, ſuch a loſs was moſt likely to happen; that the plaintiff muſt be underſtood to have directed an inſurance which would protect him againſt ſuch a loſs; and that he could not be ſuppoſed to be aware of the exception in the policies of the Royal Exchange Aſſurance Co.—But,

Lord ELLENBOROUGH, upon this part of the caſe ſaid, the plaintiff muſt be taken to have been cognizant of the exiſtence of the chartered companies, and the tenor of their policies,—matters which ſince the publication of Mr. Park's book on Inſurance were familiar to all perſons in the leaſt degree converſant with theſe ſubjects (*a*). If he wiſhed that the policy upon this cargo ſhould not be effected on the terms of the Royal Exchange Aſſurance Co., he ought to have given ſpe-

(*a*) Park, 7, 8, 21.

cial

cial directions to the defendants for this purpoſe; and at any rate, having been ſo late in reproaching them with what they had done, he had acquieſced in, and adopted, the policy which they actually effected.

The other ſpecial counts of the declaration charged the defendants with negligence, in not giving due notice of abandonment to the underwriters, ſo as to have enabled the plaintiff to recover for a *total loſs*.

Although an inſurance broker is bound to obey the poſitive directions of the aſſured to abandon, yet if it is referred to his diſcretion, whether to abandon or not, and he acts *bonâ fide*, he is not liable to an action for neglecting to abandon.

On the 28th of January, as the ſhip was proceeding down the river from Waterford, ſhe ſtruck upon a rock, and immediately filled with water. The greater part of the plaintiff's wheat was ſaved, but was ſo much damaged by the ſalt water, that it produced only 95*l.* 13*s.* 4*d.* The abandonment was not made till the 18th of February following. On the 2d of February, the plaintiff who reſided at Liverpool, wrote a letter to the defendants, which they received in London on the 4th, and in which, after mentioning the ſtranding of the ſhip, he ſays, "In the mean time, if any ſteps can be taken for my intereſt with your underwriters, I truſt to your uſual goodneſs to do the needful.—I ſhould wiſh to abandon, if it be admitted of." The defendants, by return of poſt, wrote back, that it would be imprudent to ſay any thing to the underwriters without learning ſome farther particulars. The plaintiff did not write them again till the 9th, when he neither complained of the abandonment not being made, nor directed them to abandon. However, they ſent in a notice of abandonment on the 18th of the ſame month, which, in *Anderſon* v. *The Royal Exchange*

Assurance Co. 7 East, 38, was held by the court of K. B. to be too late.

Garrow now contended, that it was the duty of the defendants to have abandoned the moment they received the letter of 2d February, requiring them "*to do the needful*," or to take such steps on behalf of the plaintiff as might be necessary for his interest,—one of which, under the circumstances of the case, clearly was, giving immediate notice of abandonment to the underwriters.—But

Lord ELLENBOROUGH held, that no negligence could be imputed to the defendants for not abandoning before the 18th.—The plaintiff's letter of the 2d left it to the defendants' discretion to act as they should think most expedient; and if he was dissatisfied with their conduct, he ought immediately to have said so. Instead of that, he lay by till the 9th, and even then did not complain, or give them any fresh orders upon the subject. Had he positively required them to abandon, they would have been answerable for not complying with his request as soon as possible; but he had referred them to their own judgment, and it seemed as if he himself at the time had thought that they acted judiciously.

Plaintiff nonsuited.

Garrow, *Scarlett* and *Richardson* for the plaintiff.

The

The *Attorney General*, *Park* and *Topping* for the defendants.

[Attornies, *Blackſtock*, and *Kaye & Froſtfield.*]

Vide Smith *v.* Cológan, 2 T. R. 188. *a.* Wilkinſon *v.* Coverdale, 1 Eſp. Caſ. 74. Seller *v.* Work, Marſh. 299.

THOMPSON *v.* HAVELOCK.

Friday, December 23.

If A. while employed as maſter of a ſhip, of which B. is the owner, gives part of his perſonal ſervices to C. for a ſtipulated ſum, and C. pays this into the hands of B., an action to recover it cannot be ſupported againſt B. at the ſuit of A.

THIS was an action for money had and received.

In April 1800, the plaintiff was at Smyrna as captain of the ſhip *Lord Nelſon*, of which the defendant was owner. There he entered into an agreement with the deputy commiſſary of the Engliſh army in Egypt, to let the ſhip to government for ſix months. Having ſtipulated that his owner ſhould have 40*s.* per ton per month, he required that he himſelf ſhould be allowed the uſual primage. The commiſſary refuſed to make any allowance by way of primage, the freight being ſo very high; but, as he expected great aſſiſtance from the plaintiff's ſkill and activity in managing the tranſport ſervice in that quarter, he agreed, that inſtead of primage, Captain Thompſon, for his perſonal exertions in the public ſervice, ſhould be allowed 1*s.* per ton per month upon the tonage of the *Lord Nelſon*.

The plaintiff and the ſhip remained in the Mediterranean under this contract about nine months; and the defendant afterwards received from government the money which they had thus earned. The queſtion was, whether the plaintiff as captain, or the defendant as owner of the ſhip, was entitled to the 1s. per ton per month.—On the part of the plaintiff it was proved, that by the uſage of the Mediterranean trade, if he had brought home a cargo of merchandize from Smyrna (which he was about to do when he entered into the ſervice of government), he would have been entitled to a primage of 5l. per cent. upon the freight, and that while he continued in the ſervice of government, his perſonal exertions, independently of the ſhip, were of conſiderable benefit to the public.

Lord ELLENBOROUGH.—Is it contended that a ſervant, who has engaged to devote the whole of his time and attention to my concerns, may hire out his ſervices, or a part of them, to another? It would have been a different thing, if the owner had been ſuing for this money; but I am clearly of opinion, that at all events the preſent plaintiff has no right to it. Under this contract, he muſt have been taken from ſuperintending the defendant's ſhip; and I don't know how far it might go, if ſuch earnings could be recovered in a court of juſtice. No man ſhould be allowed to have an intereſt againſt his duty. I will aſſume, that the plaintiff obtained as high a freight as poſſible for his owners, and that his ſervices to government were meritorious: Still there would be no ſecurity in any department of life or of buſineſs, if ſervants could legally

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let themſelves out in whole or in part. My opinion upon the ſubject is quite deciſive; and if it be doubted, I beg that a bill of exceptions may be tendered.

The plaintiff's counſel acquieſced in this deciſion; and, upon the recommendation of the CHIEF JUSTICE, it was agreed that the defendant ſhould make the plaintiff an allowance for primage.

Park and *Abbott* for the plaintiff.

The *Attorney General*, *Garrow* and *Marryat* for the defendant.

[Attornies, *Swain* and *Aitchiſon.*]

See a very learned note of Mr. Hargrave upon the villenage maxim, "*quicquid acquiritur ſervo acquiritur domino*", in which he ſtates it as his opinion, that a maſter cannot maintain an action for the earnings of his ſervant (altho' he may for thoſe of his apprentice) where the ſervice has been without his privity, as "the maſter's proper remedy in all caſes, except thoſe in which the ſervant is intentionally employed on his maſter's account, ſeems to be an action, either againſt the employer for loſs of ſervice, if he knew of the firſt retainer, or againſt the ſervant himſelf for breach of his contract," Co. Lit. 117. a. (1) But the maſter may retain the earnings of his ſervant when once paid into his hands; as he is equitably entitled to them; and his right can leaſt of all be controverted by the ſervant. Barber *v* Dennis, 6 Mod. 69. *Anon.* 12 Mod. 415. Treſwell *v* Middleton, Cro. Jac. 653. 15 Vin. Abr. *Maſter and Servant* (O. 2)

Tueſday, December 27.

EDWARDS *v.* FOOTNER.

A *repreſentation* made by an inſurance broker, when the names of the underwriters are put upon a ſlip, is binding on the aſſured, unleſs qualified or withdrawn by ſome communication upon the ſubject, between that time and the execution of the policy.

THIS was an action on a policy of inſurance on goods in the Fanny, from London to Hayti.

The ſhip was captured by a French privateer with the goods on board; and the queſtion was, whether the underwriters were diſcharged by a *repreſentation* concerning her equipment.

It appeared, that about a week before the policy was ſigned, the names of the underwriters were put down upon a ſlip, when the broker ſtated to the defendant, "that the Fanny was to ſail with the Hopewell and Young Roſcius, both armed ſhips, and that ſhe was herſelf to carry *ten guns and twenty-five men.*" There was no evidence of any converſation upon the ſubject having paſſed between the parties either when the policy was ſigned, or in the intervening period. In fact, the Fanny ſailed by herſelf, and carried only *eight guns and ſeventeen men.*

Topping, for the plaintiff, contended, that the ſhip was ſufficiently equipt to be ſeaworthy, and that what was ſaid when the defendant's name was put upon the ſlip, could not be conſidered as a *repreſentation* which the aſſured were bound to comply with, as the ſlip was no evidence of the contract, and the court could only look to what took place when the policy was ſubſcribed. This very point had been lately decided

decided in *Dawſon* v. *Atty*, 7 Eaſt, 367, where it was held, that although the broker, when the ſlip was ſubſcribed, had ſaid that the ſhip was *an American*, yet, as he had not repreſented her to be of any particular country at the time when the policy was ſubſcribed, ſhe did not require to be documented as an American, and, although ſhe was captured for want of a certificate required by a treaty between the government of the captors and the United States of America, the owner of the goods recovered againſt the underwriters.

Lord ELLENBOROUGH.—If a repreſentation is once made, it is to be conſidered as binding, unleſs there is evidence of its being afterwards altered or withdrawn. In the caſe cited, the veſſel was ſtated to be *an American* when the ſlip was made out; but when the policy came to be ſigned, the broker ſaid generally, "that it was an inſurance on goods in the Hermon," without deſcribing her as of any particular country. There, the firſt converſation was qualified and controuled by what followed. But here there is no evidence of any converſation upon this ſubject between the parties ſubſequently to the ſtatement that the ſhip was to carry 10 guns and 25 men; and this having taken place when the inſurance was talked of, and the terms of it were agreed upon, it muſt be referred to the policy, and treated as a repreſentation which required to be ſubſtantially complied with on the part of the aſſured (*a*).

Verdict for the defendant.

(*a*) *Vide* Chriſtie v. Secretan, 8 T. R. 192.

A policy on goods is not vitiated by the ship violating the convoy act, without the privity of the assured.

Another objection taken in this case was, that the ship had sailed without convoy, and that in the licence from the Admiralty authorizing her to do so, she was described as carrying 10 *guns and* 40 *men*: The *Attorney General* contended, that her carrying this complement of men and guns, was either a condition precedent to the operation of the licence, or that the licence had been obtained upon a fraudulent representation that such was her strength, and was therefore void.—But

Lord ELLENBOROUGH, after referring to the convoy act, 43 G. 3. c. 57, held, that the policy on the goods was not affected, by the terms of the licence not being complied with on the part of the ship-owner,

Topping and *Taddy* for the plaintiff.

The *Attorney General* and *Park* for the defendant.

[Attornies, *Palmer & Co.* and *Chapman.*]

Wednesday, December 28.

DALZELL *v.* MAIR.

In an action by the assured against an underwriter for a return of premium, the policy is conclusive evidence of the receipt of the premium by the defendant.

ASSUMPSIT for money had and received.—Plea, the general issue.

The defendant had underwritten a policy of insurance effected by one Reid, an insurance broker, on account of the plaintiff, upon goods by ship or ships, at and from Berbice to Great Britain. This action was

was brought to recover back the premium, on the ground that the goods had never been ſhipped.

The plaintiff gave in evidence the policy ſigned by the defendant, which contained the uſual acknowledgment on the part of the underwriters,—"*confeſſing ourſelves paid the conſideration due unto us for this aſſurance by the aſſured*," &c. It appeared, however, that no money had really been paid in reſpect of the inſurance in queſtion. The plaintiff being the holder of a bill of exchange accepted by Reid, which was not paid when due, the latter propoſed, by way of ſatisfaction, to get policies of inſurance underwritten for him. This policy was effected in conſequence; and Reid having a running account with the defendant, had not paid him any part of the premium at the commencement of this action.

The *Attorney General* contended, that under theſe circumſtances the action would not lie, as no money had been received by the defendant either from the plaintiff or Reid, or paid by the plaintiff either to Reid or the defendant.

Lord ELLENBOROUGH.—The defendant is bound by the receipt in the policy. If a man acknowledges that he has received a ſum of money from a broker, and accredits him with his principal to that amount, he ſhall not afterwards, as between himſelf and the principal, be allowed to ſay that the broker never paid him. I ſhould completely knock up the inſurance buſineſs, if I were to allow this acknowledgment to be impeached. It is well known that there are running

ning accounts kept between the insurance broker and the underwriter; and Lord Kenyon held that the former, before paying the premiums to the latter, might maintain an action against the assured to recover the amount of them *as for money paid* (*a*).

The question of fact as to whether any goods had been shipped at Berbice was afterwards referred.

Park and *Marryat* for the plaintiff.

The *Attorney General*, *Lawes* and *Wylde* for the defendant.

[Attornies, *Warren* and *Wild.*]

(*a*) I do not find any decision of Lord Kenyon's upon this point in print; but in *Airy* v. *Bland*, Sittings after T. T. 14 G. III. Park, 27, Lord Mansfield allowed the assignees of an insurance broker, in an action against the assured, to recover for premiums of insurance which the bankrupt had not paid to the underwriters.

The object of the formal acknowledgment of the receipt of the premium inserted in the policy is probably to preclude the necessity of proving it when a loss happens, and to prevent the underwriters from objecting the want of consideration for their promise in case the broker has not paid them. The receipt is no bar to an action for the premium by the underwriter against the broker; and the distinction seems to be, that as between these parties it is no evidence at all, but that as between the underwriters and the assured it is conclusive.—It follows from this decision, that an action cannot be maintained for premiums of insurance by the underwriter against the assured, which has hitherto been *vexata quæstio*. Park, 26. Marsh. 334.

ATKINSON *v.* ABBOTT.

Same day.

THIS was an action on a policy of insurance dated October 20th 1807, on goods in the ship Susannah, from London to Helsenberg, the Sound, or Copenhagen, all or either of them.

A voyage from this country to a place surrendered to his Majesty's arms, commenced after the period at which, according to articles of capitulation published in the London Gazette, it was to be restored to the enemy, and after in fact it was restored, is not illegal, if intelligence of that event had not reached England when the ship sailed, and the object of the adventure was not a trading with the enemy.

The ship sailed from the Nore on the 22d of October, under convoy of a ship of war, but parted company in a gale of wind, and was taken in the Cattegate on the 11th of November, as she was proceeding for the Sound. She had a clearance for Helsenberg, but she was consigned to a merchant at Copenhagen, who had resided many years in London. In the charterparty by which she was hired for this voyage, it was stipulated that she should go "to Copenhagen, or Elsinore, or as near thereunto as she could safely get," without any mention of Helsenberg. The object of the adventure was, to sell provisions to the British forces employed to bring off the Danish navy. The captain swore, that at the time when he was captured he had no distinct notice of the English having evacuated the Isle of Zealand.

The defence relied upon at nisi prius was, *the illegality of the voyage*. By the capitulation of Copenhagen, the conditions of which were published in the London Gazette on the 16th of September, the place was to be restored, at the latest, in six weeks from the date of its surrender to the English arms. That

period expired on the 19th of October; and in fact the Isle of Zealand was completely evacuated by our troops on the following day, which was previous to the commencement of the voyage insured. It was contended, therefore, that this voyage was equally illegal as if the ship had been bound to a port on the coast of France.

Lord ELLENBOROUGH.—It is unreasonable to require that the plaintiff should have formed a speculation as to the time when Copenhagen would become a hostile port, from reading the London Gazette. Circumstances might easily have intervened to prevent the restoration of the place for a fortnight or three weeks. Long delays occurred in giving up the Cape of Good Hope, and other places, which we agreed to cede by the peace of Amiens. This is a flimsy defence indeed. The speculation of a British merchant, calculated to be beneficial to his country, is not to be treated as an illegal adventure.

Verdict for the plaintiff.

In the ensuing term, The *Attorney General* moved for a rule to shew cause why there should not be a new trial in this case, contending that the voyage was illegal, as well on account of the restoration of Copenhagen to the Danes before the commencement of the voyage, as on this additional ground, that on the 2d of September 1807, an Order of Council had been published forbidding all vessels to clear out after that day

day from the United Kingdom for any port in the Daniſh dominions.—But

Per CUR.—When Copenhagen ſurrendered to his Majeſty's arms, the order *pro tanto* was ſuſpended; and as reaſons of ſtate might, without any violation of good faith on our part, have prevented the place from being evacuated ſo ſoon as was intended, it was a fair ſpeculation to ſail in the end of October, with an intention of going there, if it ſhould be poſſible, if not, of going *cy prés*.

The *Attorney General* then took another objection, that the clearance to Helſenberg was fraudulent; but this had no connection with the niſi prius deciſion above reported.

Garrow, *Taddy* and *Adam*, jun. for the plaintiff.

The *Attorney General*, *Beſt*, Serjeant, and *Lawes* for the defendant.

[Attornies, *Palmer & Co.* and *Reardon.*]

Vide Potts *v.* Bell, 8 T. R. 548. — Vandyke *v.* Whitmore, 1 Eaſt, 475.

HIBBERT

Thurſday, Dec. 29.

HIBBERT AND OTHERS v. MARTIN.

In a policy of inſurance the perſons intereſted were denominated "The truſtees of Meſſrs. K., F. & Co." Held that this might be conſidered their uſual ſtile and firm of dealing within ſtat. 28 G. III. c. 56 § 1.

THIS was an action on a policy of inſurance on the ſhip Wentworth, at and from Jamaica to London.

In the policy the plaintiffs were denominated "The truſtees of Meſſrs. Keighley, Ferguſon and Co." and a deed was put in which proved that they acted in that capacity. In one ſet of counts, the intereſt was laid in the plaintiffs, and in another in J. E. Keighley.

Park objected that the policy was void by ſtat. 28 G. III. c. 56. § 1. whereby it is required that there ſhall be inſerted in every policy of inſurance the name or names, or *the uſual ſtile and firm of dealing* of one or more of the perſons intereſted in ſuch inſurance, or of the conſignor or conſignees of the property inſured, or of the perſon or perſons reſiding in Great Britain who ſhall receive the orders for and effect ſuch policy, or of the perſon or perſons who ſhall give the order or direction to the agent or agents immediately employed to negociate or effect the ſame. But the deſcription of *the truſtees of Meſſrs. K., F. & Co.* could not be conſidered *the uſual ſtile and firm of dealing* of the plaintiffs, who were the perſons really intereſted, nor ſatisfy any of the other words of the the ſtatute. Notoriety was the object of the legiſlature, which could not be obtained by the denomination which the plaintiffs had in this inſtance aſſumed.

Lord

Lord ELLENBOROUGH.—I think it may be be conſidered their uſual ſtile and firm of dealing for this purpoſe (*a*).

The declaration laid the loſs to have been by the barratry of the maſter. Pleas, *non aſſumpſit*, and *actio non accrevit infra ſex annos*.

If the captain of a ſhip inſured barratrouſly carries her out of the courſe of the voyage, procures her to be condemned in a vice admiralty court, ſells her, and delivers her up to the purchaſer, it is only from this laſt event that the ſtatute of limitations begins to run as between the aſſured and the underwriter.

The plaintiff's caſe was, that the captain unneceſſarily returned with his ſhip to Jamaica a few days after he ſailed; that with a view to his own advantage he fraudulently procured the ſhip to be condemned in the Vice Admiralty court there; that he ſold her accordingly, and that he afterwards delivered her up to the purchaſers.—His return back and the condemnation were more than ſix years before the commencement of the action; the ſale and delivery of the ſhip were within the ſix years.

Park, for the defendant, contended, that even ſuppoſing the captain to have acted barratrouſly, the barratry was complete when he abandoned the voyage for the purpoſe of making away with the ſhip, or at any rate when he had fraudulently procured the ſhip to be condemned; ſo that in either way, the action was barred by the ſtatute of limitations.—But

Lord ELLENBOROUGH expreſſed himſelf of opinion that the cauſe of action did not accrue, as the loſs

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(*a*) It has been held that this ſtatute bearing upon a contract *uberrimæ fidei*, ought to receive a very liberal conſtruction.—Wolff *v.* Horncaſtle, 1 B. & P. 316.—Bell *v.* Gilſon, *Ib.* 345.

did

did not happen, till the maſter had diveſted himſelf of the poſſeſſion of the ſhip, by delivering her up to the purchaſers (*a*).

The jury, however, agreeably to my Lord's direction upon the merits, found that no barratry had been commttted, the acts of the captain being neceſſary from the unſeaworthineſs of the ſhip; and the defendant had a verdict.

The *Attorney General*, *Topping* and *Scarlett* for the plaintiffs.

Park and *Taddy* for the defendant.

[Attornies, *Crowder* & *Lovie*, and *Kaye* & *Frobfield*.]

(*a*) If the maſter commits barratry during the voyage, the underwriters are not at all liable for a loſs which happens in conſequence thereof after the voyage is completed.—Lockyer v. Offley, 1 T. R. 252.

PARMETER *v.* TODHUNTER.

Friday, Dec 30.

If an insurance broker requires the underwriters upon a policy, to settle as for a total loss, and to give directions for the disposition of the property insured, this does not amount to an *abandonment*.

There must be an abandonment of freight where the goods specifically exist, although the ship is incapable of prosecuting the voyage.

In a case of capture and recapture, the mate, in the absence of the captain, has a right to hypothecate the ship for the purpose of paying the salvage to the recaptors.

THIS was an action on a policy of insurance on the freight of the ship *Portsea*, at and from Berbice to London.

The ship was captured, recaptured, and carried into Grenada, where she was sold with the whole of her cargo. The plaintiff went for a total loss, but (amongst other objections to his claim) it was contended on the other side, that there had been no sufficient abandonment.

On the 9th November 1807, news was received in London that the ship had been captured, recaptured, and carried into Grenada, and that the captain, with eleven of the crew and all the ship's papers, had been carried away by the enemy. The same day, the broker stated these facts to the underwriters, and required them to settle as for a total loss, and to give directions as to the disposition of the ship and cargo; but he neither then nor afterwards gave any express notice of abandonment.

Park, for the plaintiff, contended, that what the broker had done virtually amounted to an abandonment, both from the understanding of Lloyd's coffee house, and from the nature of the thing, as the assured could not claim a total loss without abandoning the subject matter insured to the underwriters.

Lord ELLENBOROUGH. — There is no implied abandonment by a demand of a total loſs. It would be very well to prevent parol abandonments entirely; but if they are allowed, I muſt inſiſt upon their being expreſs. An implied parol abandonment is too uncertain, and cannot be ſupported. The abandonment muſt be expreſs and direct, and I think the word "*abandon*" ſhould be uſed, to render it effectual (*a*).

It was then contended that in a caſe like this no abandonment was neceſſary. *Sed non allocatur*; for the goods might have been brought home in another ſhip, and ſo the freight might have been earned.

Lord ELLENBOROUGH ſeemed to be of opinion that at any rate the plaintiff could not turn this into a total loſs, and ſaid that the mate, who was the only one of the crew who remained in the ſhip when ſhe was recaptured and carried into Grenada, had a right in the abſence of the captain, to hypothecate the ſhip, or to ſell a part of the cargo, for the purpoſe of raiſing money to pay ſalvage to the recaptors.

The defendant had paid 30*l.* per cent. into court, and it was referred to ſee whether this ſum was ſufficient to cover the partial loſs.

(*a*) So where a letter ſtating the damage done to a cargo inſured was ſhewn to the underwriters, and they deſired that "the aſſured would do the beſt they could with the damaged property," — Lord KENYON held that this did not enable the aſſured to go for a total loſs. Thelluſon *v.* Fletcher, 1 Eſp. Caſ. 73.

Park

Park, *Topping* and *Barrow* for the plaintiff.

The *Attorney-General* and *Richardſon* for the defendant.

[Attornies, *Barrow* and *Willis*.]

Vide Allwood *v.* Henckell, Park, 172.

KNOX *v.* WOOD.

Same day.

THIS was an action on a policy of inſurance upon the Friendſhip, at and from Briſtol to St. Thomas's and Jamaica, and from thence back to Dublin. The inſurance was ſtated to be on "commiſſions valued at 1000*l.* without average, and without benefit of ſalvage." The declaration, after averring that the plaintiff was intereſted in the ſaid voyage and commiſſions in manner and form thereafter more particularly mentioned, ſet out a charterparty of affreightment between the plaintiff and the owner of the Friendſhip; whereby it was agreed that ſhe ſhould carry out a cargo (the property of another perſon) which ſhe then had on board to St. Thomas's; that having landed it, ſhe ſhould proceed to Jamaica, and there take in a cargo of colonial produce for Dublin; that the owner ſhould receive

A. reſiding in Dublin having agreed with B. and C. at Jamaica to ſend out two ſhips annually, for which they were to provide cargoes to be conſigned to him, chartered a ſhip which was to proceed from Briſtol to St. Thomas's, where ſhe was to deliver an outward cargo, (the property of another perſon) and from thence to Jamaica, where ſhe was to take in a cargo from B. and C. for Dublin; and by the terms of the charterparty A., in conſideration of guaranteeing the homeward cargo, was to receive a commiſſion of 2½ per cent. upon the homeward freight. The ſhip was captured on her paſſage from St. Thomas's to Jamaica. Held, that A. had not then an inſurable intereſt either in the commiſſion on the freight, or in the commiſſion on the ſale of the homeward cargo.

freight at the current rate; and that the freighter ſhould be entitled to a commiſſion of two and a half per cent. on the amount of this freight for the guarantee of the cargo. The declaration afterwards ſtated, that the ſhip was captured on her way from St. Thomas's to Jamaica; "whereby the ſaid voyage was wholly defeated, and plaintiff was prevented and hindered from ſhipping and bringing the ſaid cargo from Jamaica to Dublin in the ſaid ſhip, and wholly loſt his ſaid commiſſions and intereſt in the ſaid cargo, and all benefit and advantage to be derived from the completion of the ſaid voyage."

The *Attorney General*, in opening the caſe, ſtated that the plaintiff who now reſides in Dublin, having been at Jamaica in 1806, entered into an agreement with a houſe there, that he ſhould ſend out two ſhips annually, for which they were to provide cargoes to be conſigned to him at Dublin. In conſequence, the ſhip in queſtion was freighted in the manner ſtated in the declaration. She diſcharged her outward bound cargo at St. Thomas's, and ſailed for Jamaica, but was captured and carried into Cuba. There, by an illegal act, which could not prejudice the plaintiff, the captain ranſomed her and proceeded on his his voyage. The ſhip upon her arrival at Jamaica was ſeized by the vice admiralty court, and was not releaſed till the ſeaſon was loſt, and it had been found neceſſary to ſend the cargo which had been provided for her by another veſſel. — *Mr. Attorney General* contended that the plaintiff had a direct intereſt which was the ſubject of inſurance in the voyage that had thus been loſt. Had the ſhip arrived at Dublin, he

he would have received both a commiſſion upon the freight and a commiſſion upon the ſale of the cargo; and why ſhould he not be allowed an indemnity againſt the loſs of theſe advantages, which in that event would certainly have accrued to him? Nor did it make any difference that the ſhip was taken before ſhe arrived at Jamaica, this caſe being exactly like ſome that had been lately decided, in which it was held that where there was an inſurance on freight, the aſſured might recover if the ſhip was going to her loading port for the expreſs purpoſe of taking in a cargo when the loſs happened (*a*). By a particular contract there may be an intereſt created both in freight and commiſſion, before the goods are put on board, and by reaſon of the charterparty in this caſe, the plaintiff had an inſurable intereſt when the ſhip ſailed from St. Thomas's for Jamaica.

Lord ELLENBOROUGH.—It ſtrikes me that this was a mere expectation. The plaintiff had an intereſt in the ſhip from St. Thomas's, only in the expectation of a cargo. The expectation is fruſtrated by the capture, and the intereſt was never on board. This is an inſurance of an expectation of an expectation. If you think there is any thing *ſperate* in it, I will ſave the point. I am perfectly ſatisfied myſelf that the plaintiff cannot recover upon this policy.—To decide otherwiſe would be to repeal the ſtatute.

Verdict for the defendant.

(*a*) Thompſon *v.* Taylor, 6 T. R. 478. Horncaſtle *v.* Suart, 7 Eaſt, 400.—Sed vide Forbes *v.* Cowie, *ante*, 250.

In the enſuing term the *Attorney General* did move for a new trial: but the COURT were clearly of opinion that the plaintiff had not an inſurable intereſt when the loſs happened. Lord ELLENBOROUGH ſaid, This caſe carries us into the land of dreams, and if ſupported, would introduce the practice of inſuring a 20,000*l.* prize in the lottery without purchaſing a ticket!—Rule niſi refuſed.

The *Attorney General* and *Barrow* for the plaintiff.

Garrow, *Park* and *Richardſon* for the defendant.

[Attornies, *Barrow* and *Kaye & Freſtfield.*]

Had goods conſigned to the plaintiff been actually on board, when the loſs happened, according to an opinion thrown out by Lord Kenyon, he would have had an inſurable intereſt in his commiſſions as conſignee. Flint *v.* Le Meſurier, Park, 268 *n.* So the commiſſions and privileges of the captain of a ſhip may be inſured. King *v.* Glover, 2 N. R. 206.—*Vide* Grant *v.* Parkinſon, Park, 267. Barclay *v.* Couſins, 2 Eaſt, 544. Lucena *v.* Crawford, 3 B. & P 75. 2 N. R. 269. S. C.

COMMON PLEAS.

ADJOURNED SITTINGS IN LONDON.

BUCK v. BUCK.

Monday, December 12.

B. being employed by A. to purchaſe for him certain transferrable ſhares in an unincorporated company, charged and received from him 25*l.* beyond the market price of ſuch ſhares at the time. Held, that an action would not lie to recover back this ſum, the company being within 6 G. 1. c. 18, and the parties *in pari delicto*.

ACTION for money had and received, to recover the ſum of 25*l.* under the following circumſtances:—

The defendant was employed by the plaintiff to purchaſe for him five ſhares in a company lately eſtabliſhed called *The Britiſh Ale Brewery*. He purchaſed them accordingly, and they were transferred to the plaintiff. The higheſt premium upon ſhares in this Company was then 5*l.* each; but the defendant charged and received from the plaintiff the ſum of 50*l.* as the premium upon thoſe he had purchaſed; and it was contended that the exceſs above the real amount of the premium was money had and received to the plaintiff's uſe.—It appeared in evidence, however, that *The Britiſh Ale Brewery* is a public company, neither incorporated by charter nor act of parliament; that its ſtock was raiſed by public ſubſcription, and that its ſhares are transferrable.

Best, Serjeant, insisted that the transaction out of which the action arose was illegal; that the parties were *in pari delicto*, and that the money therefore could not be recovered from the person in possession of it. This company was clearly within 6 G. 1. c. 18. § 18. and was to be considered a common nuisance. It followed that any contract concerning these shares was a breach of the law. The statute itself had expressly prohibited "all public subscriptions, receipts, payments, assignments, transfers, pretended assignments and transfers, and all other matters and things whatsoever, for furthering, countenancing, or proceeding in any such undertaking or attempt," and *the transferring, or pretending to transfer or assign, any share or shares in such stock or stocks*, was declared to be a misdemesnor punishable with the penalties of *praemunire*. The case of the *King* v. *Dodd* (*a*) was decisive. An information was there refused on account of the statute having been so long allowed to lie dormant that the party might have been ignorant of its existence, but the court of K. B. distinctly intimated an opinion that unincorporated companies with transferrable shares were within the provisions of the statute, and earnestly warned all persons from engaging in such illegal and mischievous projects for the future.

Shepherd, Serjeant, *contrà*, denied that this company was within the act, as it did not *tend to the common grievance, prejudice or inconvenience of his majesty's subjects*, and it was only companies with this tendency

(*a*) 9 East, 516.

that the legiſlature meant to prohibit. The object of *the Britiſh Ale Brewery* was to carry on a lawful trade in a lawful manner, and to furniſh to the public at a cheap rate, and of a good quality, an article of the firſt neceſſity. It was a public benefit, therefore, inſtead of a nuiſance, and was no more illegal than any other partnerſhip comprehending a great many members. At any rate, the 25*l.* might be recovered from the defendant, as he had obtained it fraudulently, and it might be ſeparated from the reſt of the tranſaction.

Sir JAMES MANSFIELD, C. J. nonſuited the plaintiff, with leave to move to enter a verdict in his favour; but the caſe was not brought before the court.

Shepherd, Serjeant, and *Bolland* for the plaintiff.

Beſt, Serjeant, and *Barrow* for the defendant.

[Attornies, *Day* and *Wright*.]

In a ſtill later caſe, Lord ELLENBOROUGH held, that an indictment could not be ſupported for a conſpiracy to deprive a man of the office of ſecretary to one of theſe companies; and that to collect ſubſcriptions for them as ſecretary, comes ſo near to obtaining money upon falſe pretences, that if a man is indicted for ſo doing, he cannot be conſidered as proſecuted without any reaſonable or probable cauſe. *Rex* v. *Stratton and others*.—Sittings after H. T. 1809. Indictment for a conſpiracy to deprive one Thompſon of the office of ſecretary to the *Philanthropic Annuity Society*, and to proſecute him, without any reaſonable or probable cauſe, for obtaining money upon falſe pretences —It appeared that this Society is an unincorporated company, with transferrable ſhares; that there was a violent diſpute amongſt the ſubſcribers as to the choice of ſecretary; that one party, headed by the defendants, caſhiered the proſecutor;

cutor; that he ſtill went on collecting ſubſcriptions, and that they indicted him for obtaining money upon falſe pretences, of which he was acquitted.

Lord ELLENBOROUGH.—This ſociety was certainly illegal. Therefore, to deprive an individual of an office in it, cannot be treated as an injury. When the proſecutor was ſecretary to the ſociety, inſtead of having an intereſt which the law would protect, he was guilty of a crime. In Dodd's caſe, all the Judges of this court were agreed upon the illegality of theſe aſſociations; and I underſtand there has ſince been a nonſuit in the Common Pleas upon the ſame ground.—Nor can I ſay that the proſecutor was indicted without reaſonable or probable cauſe. I thought he was not guilty of the offence imputed to him; becauſe it did not appear that he acted with a fraudulent purpoſe. But he did obtain the money upon a falſe pretence. He pretended that there was then a real, legal ſociety, to which he was ſecretary; whereas no ſuch ſociety exiſted. The defendants muſt all be acquitted.

An action cannot be maintained by an innkeeper againſt a candidate at an election of members of parliament for proviſions ſupplied to *non-reſident* (any more than to *reſident* voters) after the teſte of the writ. *Loſhouſe, executor, &c. v. Wharton, Eſq. M. P.* Durham Aſſizes, 1808, Cor. WOOD, B.—Action for meat, drink, &c. ſupplied by plaintiff's teſtator, a publican, to non-reſident voters at the election of members of parliament for the city of Durham, by the deſire of the defendant, who was one of the candidates. *Hullock* and *Coltman*, for the defendant, inſiſted that this came within the *treating act*, 7 & 8 W. 3. c. 4. and cited Ribbans *v.* Cricket, 1 B. & P. 264.—*Park*, contrà, took a diſtinction between *reſident* and *non-reſident* voters. In the caſe cited, it was determined only that it was unlawful to treat *reſident* voters after the teſte of the writ, and the opinion ſeems to have been, that *non-reſident* voters were not included, as money was paid into court for the proviſions ſupplied to this claſs. WOOD, B. I think the plaintiff cannot recover. The act of parliament makes no difference between reſident and non-reſident voters, and the caſe of Ribbans *v.* Cricket is exactly in point.—*Plaintiff nonſuited.*

RICHARD

RICHARD AND JOHN GREENSTREET *v.* CARR.

Tuesday, December 13.

TROVER for four Bank of England notes, making together the sum of 95*l.*

In trover for bank notes, to prove that they belonged to the plaintiff, the evidence was, that they had been delivered out by a banker's clerk (to what person he could not tell) in payment of a cheque which was payable to the plaintiff or bearer. This held to be *prima facie* evidence of property.

The declaration literally stated the facts of the case. The plaintiffs having *casually lost* the notes, they were *found* by the defendant, who *converted* them to his own use.

It was proved that the defendant had picked up a pocket-book containing the notes; and the only question raised was, whether there was sufficient evidence that they were the property of the plaintiffs. One *Roupel* being indebted to them in 95*l.*, gave them a cheque upon his bankers for this sum, payable "to Richard Greenstreet or bearer." The bankers' clerk swore that the notes in question had been delivered out by him in payment of this cheque; but he could not say to whom.

Best, Serjeant, objected that as the cheque was payable to bearer, it might very likely have been negotiated, and therefore, that there was no sufficient evidence that the notes received for it had ever been the property of the plaintiffs.—But

Sir JAMES MANSFIELD, C. J. held, that as there was no evidence of the cheque having actually been negotiated, and as no one else appeared to claim the notes,

notes, they muſt be preſumed to be the property of thoſe to whom the cheque was given.

Verdict for the plaintiffs.

Shepherd, Serjeant, and *Lawes* for the plaintiffs.

Beſt, Serjeant, for the defendant.

[Attornies, *Scott* and *Stratton*.]

Vide Howard *v.* Smith, 2 T. R. 750, Robertſon *v.* French, 4 Eaſt, 130.

Same day.

WILLIAMSON *v.* WATTS, Spinſter.

An infant cannot accept a bill of exchange for neceſſaries.

ASSUMPSIT on a bill of exchange. Plea, infancy. Replication, that the bill was accepted for neceſſaries, and iſſue thereupon. — When the caſe was opened—

Sir JAMES MANSFIELD, C. J. ſaid, This action certainly cannot be maintained. The defendant is allowed to be an infant; and did any one ever hear of an infant being liable as acceptor of a bill of exchange? The replication is nonſenſe and ought to have been demurred to. As the point of law is ſo clear, I am ſtrongly inclined to nonſuit the plaintiff. However, if I am required to hear the evidence, I will

will do ſo, and the defendant will find redreſs in the court above, ſhould the verdict be againſt her.

It appeared that the defendant was a woman of the town, and that the conſideration for the acceptance was the ſale of ſilk ſtockings and other expenſive articles of dreſs. Whereupon—

Sir JAMES MANSFIELD directed a nonſuit.

Shepherd, Serjeant, and *Marryat* for the plaintiff.

Beſt, Serjeant, and *Barrow* for the defendant.

[Attornies, *Bell* and *Hinrich*.]

I do not find any caſe in negotiable bill or note, as that which it has been expreſsly decided, that an infant may not bind himſelf by a negotiable inſtrument for neceſſaries; and in Williams *v.* Harriſon, Carth. 160, the court of K. B. in the time of Lord HOLT, ſeem rather to have been of opinion, that he might, although not liable upon a bill of exchange drawn in the courſe of trade. It is now ſettled, however, that an account ſtated by an infant, even of monies due for neceſſaries, is invalid, Trueman *v.* Hurſt, 1 T. R. 40. Bartlett *v.* Emery, *ſb.* 42. (*a*); and it ſeems inevitably to follow, that he cannot be bound by his ſignature to a not only *primâ facie* admits the debt, but if valid, would render him liable to an action at the ſuit of the indorſee, in which the amount of the original debt could not be diſputed. The old doctrine, that a *ſingle bill* given by an infant for neceſſaries is binding, though of no immediate practical uſe, ſuch an inſtrument being now as rare as a *ſtatute ſtaple*, ſeems to afford an argument from analogy to ſhew, that a promiſſory note given by an infant for neceſſaries would be binding, if payable only to the perſon who ſupplied them. Co. Litt. 172, *a*.

FAVENC

Friday, Dec. 16.

FAVENC AND OTHERS *v.* HULLET AND OTHERS.

A. having accepted bills of exchange for B.'s accommodation, B. by way of collateral ſecurity, lodges in his hands a bill of lading of certain goods deliverable to C. who had no intereſt in them. A. pays his acceptances, and B. being indebted to him to that amount, becomes bankrupt. D. gets poſſeſſion of the goods, and ſells them.—Held, that A. might maintain an action for money had and received againſt D. to recover the proceeds.

THIS was an action for money had and received, to recover the ſum of 1362*l.* 17*s.* 10*d.*, being the produce of 61 bags of coffee, of which the defendants had obtained poſſeſſion under the following circumſtances.

In the month of March 1806, Meſſrs. Cohn & Co. of Liverpool applied to the plaintiffs, who are merchants reſiding in this town, for liberty to draw upon them to the amount of about 1600*l.*, on account of a parcel of coffee and other goods they were about to ſhip for Hamburgh, there being then no exchange between that place and Liverpool. It was at the ſame time propoſed to re-imburſe the plaintiffs by bills in their favour to be drawn by Cohn and Co. upon the conſignees of the goods, and as a ſecurity for the due honour of ſuch bills, to depoſit with the plaintiffs the bills of lading of the goods, in order that they might tranſmit them to their correſpondents at Hamburgh, and have the goods delivered to their agents, in caſe the bills drawn upon the conſignees ſhould not be accepted and paid. Theſe propoſals being agreed to, Cohn and Co. drew bills upon the plaintiffs to the amount of 1655*l.* 17*s.* 11*d.*, which were afterwards duly honored, and at the ſame time remitted to them other bills to the amount of 1674*l.* 14*s.* drawn in their favour upon ſeveral mercantile houſes at Ham-

burgh. On the 14th of April following the plaintiffs received from Cohn and Co. (amongſt others) the bill of lading of the coffee in queſtion ſhipped on board the Elizabeth Henrietta, at Liverpool; whereby it was made deliverable at Hamburgh, "*unto Seybold and Meyer or to their aſſigns.*" All the bills of exchange upon the conſignees of the goods were returned to the plaintiffs diſhonored. The ſhip being prevented from ſailing by the order in council of the 16th of April 1806, the plaintiffs, on the 12th of May following, obtained an order from his Majeſty to deliver the coffee to them, upon their giving bail in the Admiralty for its value. But on the 3d day of the ſame month, the defendants, who were likewiſe creditors of Cohn and Co., had procured from them an aſſignment of the coffee, under which they had got poſſeſſion of it before the order to deliver it to the plaintiffs could be rendered available. A commiſſion of bankrupt afterwards iſſued againſt Cohn and Co., upon an act of bankruptcy committed on the ſame 3d of May, but before this aſſignment; ſo that the queſtion was, whether their aſſignees or the plaintiffs were entitled to the proceeds of the coffee.

Shepherd, Serjeant, contended that whatever claim the plaintiffs might have to this money in equity, they clearly could not maintain an action for it at law. The bill of lading not having been indorſed to them, the legal property in the coffee had never been veſted in them, however they might have had a lien upon it, and therefore they had no legal title to the money for which it was ſold.

Beſt,

Beſt, Serjeant, contrà, maintained that the plaintiffs were virtually the conſignors of the coffee, and were therefore entitled to the proceeds of it. Having accepted and paid the bills drawn upon them by Cohn and Co. they had given a full conſideration for it, and the perſons at Hamburgh named in the bill of lading having no intereſt, could only be conſidered as their agents. Thus the plaintiffs ſtood in the place of the bankrupts, and had the ſame right to the proceeds of the coffee, which would otherwiſe have devolved upon the aſſignees.

Sir JAMES MANSFIELD, C. J. ſaid the bankrupts by the agreement had placed the plaintiffs in their ſituation in relation to the coffee. Suppoſe the ſhip had not been detained by the order in council, and Seybold and Meyer had obtained poſſeſſion of the coffee, how would the caſe have ſtood? Seybold and Meyer had not paid the bills drawn upon them, and their title would have been that of mere naked conſignees. In that character they could not have been truſtees for the bankrupts, who had in effect ſold the coffee to the plaintiffs, or charged it with the payment of the 1655*l.* 17*s.* 11*d.* which came to the ſame thing. They would have been truſtees for the plaintiffs, who had paid the bankrupts that which the conſignees ought to have paid, and were virtually the owners of the goods. The defendants had no title of any ſort, and the proceeds became money had and received by them to the uſe of thoſe who were beneficially intereſted.

Verdict for the plaintiffs.

Beſt,

Beſt, *Vaughan*, Serjeants, and *Taddy* for the plaintiffs.

Shepherd, Serjeant, and *Roberts*, for the defendants.

[Attornies, *Kaye & Freſhfield*, and *Dann & Croſland*.]

RUCKER AND ANOTHER *v.* PALSGRAVE.

Monday, Dec. 19.

In an action on a valued policy of inſurance, the paym-nt of money into court upon a count which ſtates a total loſs by capture, is no admiſſion of a total loſs, and the plaintiff is bound to prove that he has ſuffered damage from the capture beyond the amount of the ſum paid into court.

THIS was an action on a policy of inſurance on goods on board the ſhip Mariner, at and from London to Montſerrat, valued at 1155*l.* The firſt count of the declaration ſtated, that whilſt the ſhip was in the courſe of her voyage with the goods on board, "the ſaid goods were, with force and arms, and in an hoſtile manner, ſeized, captured, and carried away as prize by certain enemies of our Lord the King, *and became and were wholly loſt to the ſaid I. T. and G. G.*" [the perſons intereſted.]

The defendant pleaded the general iſſue, and paid 41*l.* per cent. into court generally upon the whole declaration.

The plaintiffs' counſel proved the rule for paying money into court, and there reſted their caſe. They contended that this admitted the total loſs as one of the allegations in the firſt count of the declaration, and that as the policy was valued, it aſcertained the amount of the demand, and impoſed upon the defendant the neceſſity to ſhew why he was not liable for the whole ſum he had underwritten. They compared it to payment of money into court upon a bill of exchange, which admits the bill, and throws the

onus upon the defendant of proving payment beyond the ſum paid into court.

Sir JAMES MANSFIELD, C. J.—I remember the time when paying money into court was not an admiſſion of any thing. However, Lord Mansfield afterwards held, that it did admit the contract ſtated in the counts on which it was paid. Still it only admits the plaintiff's general demand. If he would recover more, he muſt go on to prove further damage. The defendant in this caſe, by paying money into Court, admits that there was a capture; but a capture ſometimes proves a total loſs, and ſometimes a trifling loſs. The defendant admits that the plaintiffs have ſuffered ſo much by the capture, but denies that they ſuffered more.

The plaintiffs were nonſuited; and the Court of C. P. in the enſuing term refuſed a rule to ſhew cauſe why the nonſuit ſhould not be ſet aſide.

Shepherd and *Beſt*, Serjeants, and *Taddy*, for the plaintiffs.

Cockell, Serjeant, *Carr* and *Richardſon*, for the defendant.

[Attornies, *Kaye & Freſhfield*, and *Gregg & Corfield.*]

But proof of the rule to pay money into court will of itſelf entitle the plaintiff to a verdict with nominal damages, unleſs the defendant prove that he has paid the coſts under the rule, purſuant to the maſter's allocatur.

Horſburgh v. *Orme*. *K. B. Sittings in H. T.* 49 *Geo.* 3.—Action by payee againſt acceptor of a bill of exchange for 15*l.* 4*s.* 6*d.* In fact, the plaintiff had received 6*l.* on account of the bill from the drawer, and the defendant had paid 9*l.* 9*s.* into court

court upon the common rule, but had neglected to pay the costs; and it was to inforce payment of these that the cause was brought down to trial.—*Wigley*, for the plaintiff, satisfied himself with proving the rule for paying money into court, and the master's allocatur for 16*l.*, which he contended entitled him to a verdict.—*Cowley*, on the other side, insisted that the plaintiff was bound to produce the bill, and to offer some evidence of a further demand beyond the 9*l.* 9*s.* This sum the plaintiff had taken out of court, which was a waver of the irregularity on the part of the defendant in not paying the costs*. But—

Per Lord ELLENBOROUGH.—The rule admits that plaintiff had a cause of action, and payment after action brought, is no bar. The defendant might have had the sum paid into court struck out of the declaration; but a condition was annexed to this, which he has not complied with. The plaintiff is therefore entitled to a verdict with nominal damages.

So, if after action brought, the money sought to be recovered is paid, without a rule of court, the plaintiff must have a verdict. *Per* Lord ELLENBOROUGH.—After money paid in this manner, the defendant cannot try the merits, and the costs follow inevitably. Atkinson *v.* Thornton. Sittings after M. T. 1808.

6 Esp. Cas. 4.

* Taking money out of court, waives the irregularity of its being paid in where the plaintiff's demand is for unliquidated damages. Griffiths *v.* Williams, 1 T. R. 710. But by the terms of the rule for paying money into court, a *refusal* by the plaintiff to accept the costs, is a condition precedent to the rule being operative. *Vide* Tidd's Appendix, 181.

GOLDSCHMIDT *v.* MARRYAT†.

Friday, Feb. 24, 1809.

A Judge at *nisi prius* will not try a cause out of its order, for the purpose of preventing an *injunction* in equity against proceeding to trial.

THIS and several other actions, upon the same policy of insurance, were commenced in the Court of Common Pleas in Hilary Term, 1809. As soon as the defendants had pleaded, they filed a bill in the

† [As the points of practice involved in this case are of frequent occurrence, and the decision of the Chief Justice cannot afterwards be brought before the Court, I have thought it right to add this note to the present volume.]

Court of Exchequer, praying for a commiſſion to examine witneſſes abroad, and that the aſſured ſhould ſet out all papers in their poſſeſſion relative to the matter in iſſue. An anſwer was expeditiouſly put in; but ſeveral exceptions were taken to it, which were to be argued on the 25th of February, when a motion was to be made, on the part of the underwriters, that the aſſured might be injoined from proceeding to trial at law.

In the mean time the cauſes had been entered as *ſpecial juries* in the Chief Juſtice's paper for the adjourned ſittings in London. On the 24th of February, which was the third day of the ſittings, a great many common jury cauſes remained untried, and according to the regular courſe of proceeding, no ſpecial juries were to be appointed for ſome days. However, to prevent an injunction in theſe actions on the policy,—

Beſt, Serjeant, now moved that they might be called on for trial at the ſitting of the court the following morning. He ſtated, that an injunction was likely to be granted for an informality in the anſwer, not upon the merits; and contended, that as the Judge here had the power, ſo it was his duty to defeat proceedings which could only be meant for vexation and delay.

Shepherd, Serjeant, contrà, inſiſted that the proceedings in equity were *bonâ fide*, and neceſſary to do complete juſtice between the parties; that it muſt be ſuppoſed that the injunction would not be granted, unleſs there was ſufficient ground for it; and that the motion

was

was quite contrary to the comity and reſpect with which courts of juſtice were in the habit of treating the tranſactions of each other.

Sir JAMES MANSFIELD, C. J.—It is perhaps deſirable that the Barons of the Exchequer ſhould take ſome ſtep to check the growing practice of ſeeking for injunctions in that court againſt proceeding to trial at law (*a*). I am ſtrongly inclined to ſuſpect, that the bill in the Exchequer, in the preſent inſtance, is meant for delay, and that any fair purpoſe which it can have in view might be gained by an order of a judge of this court at chambers. I ſhould wiſh very much therefore to yield to the application, if I were fully juſtified in doing ſo. There is no doubt that a judge at *niſi prius* has authority to try the cauſes entered, in any order he pleaſes; but in exerciſing that authority he will obſerve ſome certain rule, he will attend to the intereſt and convenience of the ſuitors, and he will be guided by the practice of his predeceſſors and of his brother judges. I ſhould like to know how they act on theſe occaſions in the King's Bench, and whether there has been any inſtance in that court of taking a cauſe out of its turn for the purpoſe of preventing an injunction, which there is reaſon to believe is ſought only for delay.

(*a*) In the Court of CHANCERY, the courſe is, that if an injunction is moved for *before* declaration, it is granted to ſtay all further proceedings at law; but if the motion is made *after* declaration, the injunction ſtays *execution* only, and not *trial*. In the Exchequer, it ſtays all further proceedings, be the cauſe in what ſtage it will. 10 Veſ. 451. 2 Keb. 17. Harr. Prac. Chanc. 541. 546. 553.

Campbell, amicus curiæ, was then deputed to go into the Court of K. B., and to inquire what was the practice there upon this ſubject.—Campbell, upon his return certified, that Lord MANSFIELD had laid it down as a rule, that, although he would not wait for any proceedings in equity, he would on no account take a cauſe out of its courſe at *niſi prius* for the purpoſe of defeating them; and that the ſame rule had been obſerved by his two noble and learned ſucceſſors, Lord KENYON and Lord ELLENBOROUGH.

Sir JAMES MANSFIELD, C. J.—Then theſe cauſes muſt be left to their fate. I will not interfere.

In policy cauſes, a Judge at chambers will make an order for the aſſured to produce to the underwriters, upon affidavit, all papers in the poſſeſſion of the former relative to the matters in iſſue.

In the courſe of the diſcuſſion it was ſtated, on the part of the defendants, that they had applied to Mr. Juſtice HEATH for an order upon the plaintiff to produce, upon affidavit, all the papers in his poſſeſſion concerning the cauſe, but that that learned judge had refuſed to make any order, except for the production of ſpecific papers mentioned by the defendant, or generally, for all papers without any affidavit.

Sir JAMES MANSFIELD ſaid, I have great difficulty in believing this ſtatement to be correct. I have made fifty ſuch orders ſince I became Chief Juſtice of this court. I was, to be ſure, a good deal ſurpriſed when they were firſt applied for, as nothing of the ſort was known when I practiſed in the King's Bench. But I conſulted the other judges, and found they had become extremely common. I think they have been very properly introduced; as they often obviate the neceſſity of going into a court of equity, and ſave a great

great deal of delay, expence, and litigation. Without requiring the plaintiff to produce the papers *on affidavit*, the order would be nugatory. He would only ſelect ſuch as could be of no uſe to the oppoſite party. Nor would it anſwer to limit the order to ſuch papers as are ſpecifically named; ſince there may be others which the party has not the means of deſcribing, and which may be got at through the medium of a court of equity. I cannot believe, therefore, that my brother Heath refuſed to make an order on the plaintiff to produce upon oath all papers in his poſſeſſion concerning the cauſe now at iſſue.

It turned out that the application had not been made to Mr. Juſtice Heath in the regular manner.

Beſt, *Marſhall*, *Vaughan*, Serjeants, and *Wigley*, for the plaintiff.

Shepherd and *Lens*, Serjeants, for the defendant.

[Attornies, *Willett & Co.* and *Crowder & Co.*]

Vide Clifford *v.* Taylor, 1 Taunton's C. P. Rep. 167. where, in a policy cauſe, the Court ordered the plaintiff to produce *all papers*, in the moſt general terms, and directed, that if the defendant was not content with ſuch as were thereupon given him, the plaintiff ſhould make a ſpecial affidavit, denying the relevancy of what were withheld.

As to the authority of a Judge at Chambers, *vide* Wood *v.* Plant, 1 Taunton's C. P. Rep. 47.

MEMORANDA.

1. The *Attorney General*, during the period of theſe reports, was Sir VICARY GIBBS, Knight.
2. In Bainbridge *v.* Neilſon (*ante* 237,) a ſpecial caſe was ſet down for argument, and argued in Michaelmas Term laſt, when the Judges unanimouſly determined that the aſſured was *not* entitled to abandon, it appearing in the reſult, that at the time when the notice of abandonment was given, it was in fact only a partial, and not a total loſs, as had been ſuppoſed. 10 Eaſt, 329.
3. I find that the names of the parties in the caſe reported as *Anonymous*, (*ante* 398), were *Stainforth* v. *Staggs*, and that the court of K. B. afterwards refuſed a rule to ſhew cauſe why the verdict for the plaintiff ſhould not be ſet aſide. In *Fernall* v. *Horne and others*, Sittings after H. T. 1809, which was likwiſe an action againſt pariſh officers to recover back money paid by the putative father of a baſtard child to indemnify the pariſh, *Stainforth*, v. *Staggs* and *Townſon* v. *Wilſon*, (*ante* 396), were cited on the part of the plaintiff, and were allowed by the counſel for the defendants to be clear law.
4. The caſe of Blackenhagen *v.* The London Aſſurance Company, (*ante* 454), was again tried in C. P. at the Sittings after laſt H. T. when Sir JAMES MANSFIELD, C. J. left it as a queſtion of fact to the Jury, whether the ſhip had abandoned the voyage inſured or not, and the plaintiff obtained a verdict.

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A

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ACTION.

See ASSUMPSIT. CANDIDATE. BILL OF LADING, 2. FOREIGN JUDGMENT, 1, 2.

1. If a man, by a falſe repreſentation, induces another to ſupply goods on the credit of a third perſon, and enters into a collateral undertaking, not in writing, to pay for them, he is not liable as for goods ſold, but muſt be ſued in an action of deceit. *Thompſon* v. *Bond.* 4
2. *Semble* that where an action has been brought for the value of goods furniſhed at a ſtipulated price, and the purchaſer does not, either in bar of the action, or to reduce the damages, object to the quality of the goods, but allows the ſeller to recover a verdict for the full price agreed upon, he cannot afterwards maintain a croſs action on the ground of the goods being of a bad quality and unfit for the purpoſe for which they were ordered. *Fiſher* v. *Samuda,* 190 (*See* QUANTUM MERUIT.)
3. An action on the caſe will not lie for detaining cattle diſtrained and impounded, where a tender of amends was not made till after the impounding. And *comme ſemble* ſuch an action could not be ſupported, even if the tender of amends had been made before the impounding; as the proper mode to try the validity of a diſtreſs is by action of replevin or treſpaſs. *Anſcomb* v. *Shore,* 285
4. An action lies againſt the ſheriff for a falſe return to a writ of *fi. fa.* notwithſtanding the plaintiff, before commencing the ſuit, having charged the defendant in the former action in execution. *Wordall* v. *Smith,* 332
5. If articles of dreſs are ſold to a woman of the town, an action will lie to recover their value, although the ſeller knew the way of life of the purchaſer; unleſs he furniſhed them with a view to enable her to carry it on, and he expected to be paid from the profits of her proſtitution. *Bowry* v. *Bennett,* 348

6. An

6. An action lies to recover back money paid to pariſh officers by a perſon taken up under a warrant as the putative father of a baſtard child, by way of bargain witn the pariſh to be releaſed from all liability reſpecting the child, — againſt thoſe who received the money; although before the commencement of the action they may have gone out of office, and accounted with their ſucceſſors for ſo much of the money as was not expended on the child and its mother during her lying-in.—However, in ſuch action, the plaintiff is only entitled to recover tne ſurplus, after theſe charges have been deducted. *Townſon* v. *Wilſon*, 396

7. So though the putative father pays the money not under dureſs but under a miſtake of law, it may be recovered back. *Anonymous*. (*Stainforth* v. *Staggs*,) 398 *n*. 546 *n*. 3

8. It is no bar to an action againſt A. for criminal converſation with the plaintiff's wife, that the plaintiff had brought another action of the ſame kind againſt B. and, having obtained a verdict and judgment, had charged B. in execution, although the cauſe of action in both ſuits accrued during the ſame period. *Gregſon* v. *M'Taggart*, 415

9. If goods put on board a ſhip to be carried from one place to another, are wrongfully ſeized by the officers of government, ſo that they cannot be delivered to the conſignee, the owner of the goods has an action for the non-delivery, againſt the owner of the ſhip, who muſt ſeek his remedy over againſt the officers of government. *Goſling* v. *Higgins*, 451

10. An action cannot be maintained by an innkeeper againſt a candidate at an election of members of parliament for proviſions ſupplied to *non-reſident* (any more than to *reſident* voters) after the teſte of the writ. *Lofhouſe* v. *Wharton*, 550 *n*.

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The admiſſions of the attorney in a cauſe are evidence againſt his client, only when they are made with a view to obviate the neceſſity of proving the facts admitted, at the trial. *Young* v. *Wright*, 140

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See PRINCIPAL AND AGENT.

AGREEMENT.

An agreement by the payee of a bill of exchange, to diſcharge a perſon liable upon it, in conſideration that the latter would not move the court of King's Bench againſt him for a miſdemeanour is illegal and void. *Pool* v. *Bousfield*, 55

ALIEN ENEMY.

See INSURANCE, 9, 10.

If a Britiſh ſubject voluntarily reſides in an enemy's country and carries on commerce there, he is diſqualified, as an alien enemy, to ſue in our courts of juſtice, although naturalized by a neutral ſtate, and recognized as a citizen of that ſtate both by its diplomatic agents and by the enemy's government. And *ſemble*, that if a neutral voluntarily reſides and carries on commerce in an enemy's country, he is an alien enemy to all civil purpoſes. *O'Mealey* v. *Wilſon*, 482

ANCIENT LIGHTS.

If a building after having been uſed for 20 years as a malt-houſe, is converted into a dwelling houſe, in its new ſtate

ſtate it is entitled only to the ſame degree of light which was neceſſary to it in its former ſtate, and the owner of the adjoining ground may lawfully erect a wall which prevents the admiſſion of ſufficient light for domeſtic purpoſes, if what is ſtill admitted would be enough for the making of malt. *Martin* v. *Goble*. 322

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See EVIDENCE, 29. TRESPASS, 2.

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See CANDIDATE.

There is no implied promiſe on the part of a Sheriff to indemnify an auctioneer who ſells goods, ſeized under a *fi. fa.* when employed to do ſo by the Sheriff's officer to whom the warrant was directed, and the plaintiff's attorney in the original cauſe, although the Sheriff certified to the exciſe office that he himſelf had ſeized and *ſold the goods*, and he in fact received his poundage from the produce of the ſale. And if an action of treſpaſs is brought by the owner of the goods againſt the auctioneer, the ſheriff and others, all the damages awarded in which are levied upon the auctioneer alone, he has no action for a contribution againſt any of his co-defendants. *Farebrother* v. *Anſley*, 343

Q. Whether, if the ſheriff had himſelf actually employed and directed the actioneer to ſell the goods, there would have been an implied promiſe of indemnity? *Ib.*

ATTESTING WITNESS.
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ATTORNIES.
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1. An attorney retained to defend an action, is not bound to follow the inſtructions of his client to do what is meant merely for delay. 176
2. Although an attorney ſhews his client a copy of his bill, explaining the different charges to him, in the reaſonableneſs of which the client acquieſces, the attorney is ſtill bound to leave a copy of the bill, with him, according to the proviſions of ſtat. 2. G. II. c. 23 before he can maintain an action upon it. But where ſeveral are jointly liable to an attorney for buſineſs done, the delivery of a copy of the bill to one of them is ſufficient to maintain a ſeparate action againſt any of the others. Money paid by an attorney for coſts which his client is adjudged to pay is a diſburſement within. 2 G. II. c. 23. *Crowder* v. *Shee*, 437

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B.

BAILEE.

A workman for hire is not only bound to guard the thing bailed to him againſt ordinary hazards, but likewiſe to exert himſelf to preſerve it from any unexpected danger to which it may be expoſed. *Leck* v. *Maeſtaer*, 138

BANKRUPT.
See BILLS OF EXCHARGE, 18.

1. If a trader is denied, when at home, to a creditor who merely demands pay-

payment of a debt, but does not aſk to ſee him perſonally, this is not evidence of *a beginning to keep houſe* ſo as to conſtitute an act of bankruptcy. But if a trader withdraws from one part of his houſe where he had before uſually ſat, and where there was free acceſs to him, to a more retired part of it, to avoid perſonal applications for money, by means whereof his creditors are prevented from importuning him, this is *a beginning to keep houſe* within the meaning of the ſtatute. *Dudley* v. *Vaughan*, 271

2. If the neceſſary conſequence of a trader's departing the realm is, that his creditors muſt be delayed, he thereby commits an act of bankruptcy; ſince a man is to be conſidered as foreſeeing and meaning to bring about the neceſſary conſequences of his own acts. *Ramſbottom* v. *Lewis*. 279
3. If a natural born ſubject of this country, domiciled abroad, comes to England for a temporary purpoſe and leaves it ſooner than he intended, to avoid an arreſt, this is *a departing the realm*, and an act of bankruptcy, within ſtat. 13 Eliz. c. 7. §. 1. *Williams* v. *Nunn*. 152. 180. *c.*
4. *The lying in priſon two months*, by 21 Jac. I. c. 19. §. 2. made an act of bankruptcy, means two months of actual uninterrupted impriſonment. Therefore where a trader was arreſted for debt on the 4th of November, but allowed to go at large till the 8th, when he returned into cuſtody, and being afterwards moved into the King's Bench priſon, lay there upwards of two months.—Held that the act of bankruptcy which he thus committed, had reference only to the 8th when he returned into cuſtody, not to the 4th when the original arreſt took place. *Barnard* v. *Palmer*. 509
5. If goods are ſold to be paid by a bill at four months, and no bill is given, there is not a good petitioning creditor's debt ariſing from this ſale, to ſupport a commiſſion of bankrupt againſt the purchaſer, till the four months have expired. *Cothay* v. *Murray*. 335
6. To ſupport a commiſſion of bankrupt, it is ſtill neceſſary ſince the paſſing of ſtat. 46. G. III. c. 135. (Sir Samuel Romilly's act), that there ſhould have been a good petitioning creditor's debt ſubſiſting when the act of bankruptcy was committed; and it is not ſufficient that the petitioning creditor's debt accrued before the ſuing out of the commiſſion. *Moſs* v. *Smith*. 489
7. To ſupport a commiſſion of bankrupt, where there is only one petitioning creditor, there muſt be a debt due to him ſeparately, for which he could maintain an action at law in his own name.—Therefore one of two joint obligees is not by himſelf a good petitioning creditor againſt the obligor *Brickland* v. *Newſome*. 474
8. The notice of inſolvency mentioned in the proviſo to §. 1. of 46. Geo. III. c. 135, which renders contracts and tranſactions with the bankrupt after an act of bankruptcy, though more than two months before the date of the commiſſion, void as formerly, means notice of a general inability in the bankrupt to diſcharge his engagements. *Anonymous*. 492 *n*
9. A policy of inſurance effected by a bankrupt upon his own life at an annual premium, paſſes to his aſſignees, however ſmall the apparent value of it may be at the time of his bankruptcy, and although there are conſiderable arrears of premium then due upon it; and, if, inſtead of delivering it up as part of his effects, he ſecretly aſſigns it to another perſon, who pays the arrears of the premium, and upon the death of the bankrupt receives the ſum inſured, this ſum,

ſum, deducting the amount of the arrears ſo paid, may be recovered by the aſſignees as money had and received to their uſe. *Schondler* v. *Wace*, 487

10. If a trader on receiving bills of exchange from one of his creditors abroad, to whom he is indebted beyond the amount of them, after becoming inſolvent, but before committing an act of bankruptcy, delivers theſe bills, with the conſent of his other creditors, to an agent of the perſon who had remitted them, for the uſe of the latter if he ſhould be ultimately entitled to them; this is a legal and valid tranſaction, and if a commiſſion of bankrupt afterwards iſſues againſt the trader, his aſſignees cannot maintain an action againſt the truſtee to recover the produce of the bills. *Graff* v. *Greffulhe*, 89

11. A trader in contemplation of bankruytcy and without ſolicitation, put three cheques into the hands of his clerk, to be delivered to a creditor at the counting houſe of the latter; but before they were delivered, the creditor called upon the trader, and demanded payment of his debt. Held that the intention to give a voluntary preference not being conſummated, this was a valid payment. *Bayley* v. *Ballard*, 416

12. After a ſecret act of bankruptcy committed by one of two copartners, the other cannot by an indorſement in the name of their firm, transfer negotiable ſecurities, which exiſted before the act of bankruptcy. *Ramſbottom* v. *Lewis*. 279

13. Bankruptcy is not a diſcharge of a promiſe to allow a weekly ſum for the ſupport of an illegitimate child. *Millen* v. *Whittenbury*, 428

14. In an action by the aſſignees of a bankrupt, entries made by the bankrupt in his books before the act of bankruptcy, are good evidence to prove the petitioning creditor's debt. *Watts* v. *Thorpe*, 376

15. The defendant cannot give his bankruptcy in evidence under the general iſſue of non-aſſumpſit. *Gowland* v. *Warren*, 363

BARON AND FEME.

See LIMITATIONS, STATUTE OF, 1. BILLS OF EXCHANGE, 19.

1. Although a huſband is not cohabiting with his wife, yet if ſhe improvidently takes up goods of a tradeſman, for which he would not otherwiſe be liable, he aſſents to the contract, if having any controul over the goods, he does not cauſe them to be returned to the vendor. *Waithman* v. *Wakefield*. 120

2. A huſband is liable for neceſſaries furniſhed to his wife ſuitable to the appearance in life he permits her to aſſume, though greatly beyond his degree or his circumſtances. — *Ib.*

3. But if a tradeſman truſts a married woman, deceived by the falſe appearance ſhe aſſumes, when by cautious enquiries he might have aſcertained her real ſituation, he cannot come upon the huſband beyond the extent to which thoſe enquiries would have ſhewn him to be reſponſible. *Ib.*

4. A debt contracted by the wife before marriage ſurvives againſt her upon the death of her huſband. *Woodman* v. *Chapman*, 189

5. If a man marries a woman, and holds her out to the world as his wife, he does not diſcharge himſelf from his liability for neceſſaries ſupplied to her, by proving a previous marriage between himſelf and another woman ſtill alive; unleſs he brings home a clear knowlege of the celebration of the firſt marriage to the perſon who ſupplied the neceſſaries to the ſecond wife. *Robinſon* v. *Nahon*, 245

6. In an action for negligence, whereby the plaintiff's wife was killed, he is not entitled to any damages for the loſs of her ſociety, or for his mental ſufferings on her account, after the moment of her death. *Baker* v. *Bolton*, 493

BASTARD.

See ACTION, 6, 7. BANKRUPT, 13.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See AGREEMENT. INFANT. BANKRUPT, 12.

1. An inſtrument in the common form of a bill of exchange, except that the word *at* is ſubſtituted for *to*, before the name of the drawees, may be declared on as a bill of exchange; or *comme ſemble*, may be treated as a promiſſory note, at the option of the holder. *Shuttleworth* v. *Stephens*, 407

2. If a bill of exchange is drawn upon a firm, and one of the partners accepts it in his own name, this acceptance binds the co-partnerſhip. *Maſon* v. *Rumſey*, 384

3. If A. B. and C. are in partnerſhip, and A. draws a promiſſory note, by which he promiſes *individually* to pay the money, and which he ſigns in his own name only, but prefixing to his ſignature, "*for A. B. and C.*," this binds the whole partnerſhip. *Lord Galway* v. *Matthew*, 403

4. If a bill of exchange is accepted *payable at a particular place*, in an action againſt the acceptor, this addition to to the acceptance does not require to be noticed in the declaration, being no part of the contract, but merely a memorandum, where payment may be demanded. *Lyon* v. *Sundius*, 423

5. So if a promiſſory note is made payable at a particular place, in an action againſt the maker, there is no neceſſity for proving that it was preſented there for payment. *Wild* v. *Rennards*, 425 *n.*

6. The holder of a bill of exchange may inſiſt upon the drawee accepting it, generally in the very words in which it is drawn, or may proteſt it for non-acceptance. *Boehm* v. *Garcias*, 425 *n.*

7. If a bill of exchange is ſent for acceptance to the drawee, and he retains it in his poſſeſſion contrary to the uſual mode of dealing between himſelf and the holder, this amounts to an acceptance. *Harvey* v. *Martin*, 425 *n.*

8. But, by the uſage of trade in London, a cheque may be retained by the banker on whom it is drawn, till five in the afternoon of the day on which it is preſented for payment, and then returned, although it has previouſly been cancelled by miſtake. *Fernandey* v. *Glynn*, 426 *n.*

9. If A., the payee of a bill of exchange, indorſes it in blank, and delivers it to B., and B. writes above A.'s indorſement "*pay the contents to C.*;" B. is not liable to C. as an indorſer of the bill. *Vincent* v. *Horlock*, 442

10. A. and B. for their mutual accommodation exchange acceptances, the bill accepted by A. being made to fall due ſome days ſooner than that accepted by B.—A. having kept the bill payable to his order 20 days in his poſſeſſion without negociating it, alters the date of the bill with the conſent of B., ſo as to poſtpone the payment 20 days, and then indorſes it to C. In an action at the ſuit of C. againſt B. *held* that, by this alteration, without a freſh ſtamp, the bill was vitiated. *Cordwell* v. *Martin*, 79. 180 *b.*

11. *Semble* that the only alteration that may be made in a bill of exchange without a freſh ſtamp, is when a miſtake in the terms of it is rectified before it gets abroad into the world. *ſb.*

12. Words written on a bill, which do not affect the reſponſibility of the parties, will not vitiate it. *Marſon* v. *Petit*, 82 *n.*

13. Although the *bonâ fide* holder of a promiſſory note, made without conſideration, himſelf gave a full conſideration for it; yet if he took it after

ter it was due from an indorſer, who had given none, he cannot maintain an action upon it againſt the maker. *Tinſon* v. *Francis*, 19

14. But in an action by the ſecond indorſee againſt the acceptor of a bill of exchange, if the perſon who indorſed it to the plaintiff could himſelf have maintained an action upon it, the defendant cannot give in evidence that it was accepted for a debt contracted in ſmuggling, although it was indorſed to the plaintiff *after it had become due*. *Chalmers* v. *Lanion*, 383

15. It is no defence to an action on a bill of exchange, that the conſideration for which it was given has partially failed. *Morgan* v. *Richardſon*, 40 *n*
Fleming v. *Simpſon*, *Ib.*

16. In an action by the indorſee againſt the drawer of a bill of exchange, if it appears that the defendant drew the bill, without conſideration, and under dureſs; it is incumbent on the plaintiff to prove that he gave value for it, although it was indorſed to him before it became due. *Duncan* v. *Scott*, 100

17. If A. the indorſee, for value of a bill of exchange, to which B. the indorſer had forged the acceptance of C., delivers it up to B., on his ſolicitation, and receives from him, in lieu thereof, a bill accepted by D. without conſideration, A. may maintain an action on this bill againſt D., unleſs there was an agreement between him and B. to ſtifle a proſecution for forgery. *Wallace* v. *Hardacre*, 45

18. As an accommodation bill does not paſs under a commiſſion of bankrupt againſt the payee, he may indorſe it, after an act of bankruptcy, and his indorſee for a valuable conſideration, may recover upon it againſt the acceptor. *Ib.* 46

19. If a promiſſory note is made payable to a married woman, and ſhe indorſes it for value in her own name, and the maker afterwards promiſes to pay it,—in an action againſt him by the indorſee, it will be preſumed, that the nominal payee had authority from her huſband to indorſe the note in that form, and the indorſement will be conſidered as veſting a legal title to the note in the plaintiff. *Cotes* v. *Davis*, 485

20. The holder of a bill of exchange may diſcharge the liability of the acceptor by parol; but for this purpoſe, the words muſt amount to an abſolute renunciation of all claim upon him in reſpect of the bill. *Whatley* v. *Tricker*, 35

21. Although no conſideration paſſes between the payee and drawer of a bill of exchange, it is not to be conſidered an accommodation bill as to the latter, if there was a valuable conſideration as between the payee and the acceptor. *Scott* v. *Lifford*, 246

22. If policies of inſurance are lodged with the payee of a bill of exchange as a collateral ſecurity, they do not operate as ſatisfaction till money is actually received upon them, although upon a ſubmiſſion to arbitration a certain ſum may have been awarded to be due upon them, *Ib.*

23. A bill of exchange, all the parties to which reſided in the ſame town, became due on the 4th of the month, when it was preſented for payment by the payee's bankers, who returned it to him diſhonored on the 5th. Held, that a letter ſent by him to the drawer on the 6th, was reaſonable notice of the diſhonor of the bill, *Ib.*

24. Where the parties to a bill of exchange reſide in London or the vicinity, notice of the diſhonor of the bill may be ſent by the *two-penny* poſt, *Ib.*

25. A bill of exchange made payable to a fictitious perſon or his order, is neither in effect payable to the order of

of the drawer, nor to bearer, but is completely void; unleſs it can be ſhewn that the circumſtance of the payee being a fictitious perſon was known to the acceptor. *Bennett* v. *Farnell*, 130. 180 *c*

26. However, if money paid by the holder of ſuch a bill, as the conſideration for its being indorſed to him, gets into the hands of the acceptor, it may be recovered back as money had and received, *Ib.*

27. In an action againſt the maker of a promiſſory note, payable to A. B. *or bearer*, if the declaration ſtates that A. B. indorſed it to the plaintiff, this indorſement muſt be proved. *Waynam* v. *Bend*, 175

28. A promiſſory note is evidence under the money counts, only as between the original parties to it, *Ib.*

29. In an action by the indorſee of a bill of exchange, if the declaration ſtates the indorſement to have been made *before* the bill became due, and it appears in evidence to have been made *after* the bill was due, this is not a material variance. *Young* v. *Wright*, 139

30. In an action againſt the drawers of a bill of exchange, drawn by a firm upon one partner, if it is proved that the bill was accepted by the drawee, this is evidence of its having been regularly drawn; and in ſuch action it is unneceſſary to prove that the drawers had notice of the bill being diſhonored, *Porthouſe* v. *Parker*, 82

31. The acceptor of a bill of exchange payable to A. & B. who has accepted it after it was indorſed by A. for himſelf and B., cannot contend in an action at the ſuit of the indorſee, that the payees were not partners, and that the bill ſhould have been indorſed by both. *Jones* v. *Radford*, 83 *n*

32. Although a bill of exchange has been ſhewn to the drawer, with the name of the payee indorſed upon it, and he merely objects to paying it, that he had drawn it without conſideration; in an action againſt him by the indorſee, this does not diſpenſe with regular proof of the indorſement. *Duncan* v. *Scott*, 101

BILL OF LADING.

1. The bonâ fide indorſee of a bill of lading, for value, and without notice of the inſolvency of the conſignee, or of any other circumſtance which in fairneſs ſhould preclude him from taking the indorſement, has an abſolute right to the goods; although he knew that the conſignor had not been paid for them in caſh. *Cuming* v. *Brown*, 104. 180 *c*.

2. The indorſement of a bill of lading, *without conſideration*, does not transfer any property in the goods; and therefore the mere indorſement of a bill of lading by the conſignor to an agent, to authoriſe him to ſtop the goods *in tranſitu* on account of his principal, will not enable ſuch agent to maintain aſſumpſit or trover for the goods in his own name. *Waring* v. *Cox*, 369

BOND.

See PRESUMPTION, 1. EVIDENCE, 13. 27.

BROKER.

See PRINCIPAL AND AGENT.

BUBBLE ACT.

1. B. being employed by A. to purchaſe for him certain transferrable ſhares in an unincorporated company, charged and received from him 25*l.* beyond the market price of ſuch ſhares at the time. Held, that an action would not lie to recover back this ſum, the company being within 6 G. 1. c. 18, and the parties *in pari delicto*. *Buck* v. *Buck*, 547

2. An indictment cannot be ſupported for a conſpiracy to deprive a man of the office of ſecretary to one of theſe companies;

companies; and to collect ſubſcriptions for them as ſecretary, comes ſo near to obtaining money upon falſe pretences, that if a man is indicted for ſo doing, he cannot be conſidered as proſecuted *without any reaſonable or probable cauſe*. *Rex* v. *Stratton*, 549 *n*.

C.

CANDIDATE.

See ACTION, 10.

1. A candidate at an election of members of parliament is not liable for any part of the expences of the election, except by poſitive ſtatute or his own undertaking, notwithſtanding a long uſage for the expences being rateably defrayed by the candidates. But a candidate to repreſent a city or a borough in parliament is liable for a ſhare of the expence of adminiſtering oaths to Roman Catholic electors under 34 G. 3. c. 73. and if he makes uſe of huſtings erected by the returning officer, for the accommodation of himſelf or his agents, a promiſe on his part will be inferred to contribute to the expence of erecting them. *Morris* v. *Burdett*, 218

CARRIER.

See ACTION 9. TROVER, 1.

CASE.

See ACTION 3. TRESPASS.

CHEQUE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 8.

COMMISSION.

See INSURANCE, 12. USURY 4.

CONDITION PRECEDENT.

By a charter-party between the plaintiff, the captain of a ſhip, and the defendant's agent abroad, for the carriage of timber from Riga to Portſmouth, at a ſtipulated rate per load, the former bound himſelf, after receiving his cargo on board, *to ſail with the firſt favourable wind direct to the port of Portſmouth*. The ſhip however, unneceſſarily entered the harbour of Copenhagen, where ſhe was detained ſeveral weeks; by means whereof the defendant was put to conſiderable expence in having freſh inſurances done upon her cargo. In an action of indebitatus aſſumpſit for the freight, *held*, that the plaintiff's covenant to ſail direct to Portſmouth was not a condition precedent; and that the deviation could not be given in evidence, either as a bar to the action, or to diminiſh the damages. *Bornmann* v. *Tooke*, 377

CONSENT RULE.

See EJECTMENT.

CONVICTION.

See EVIDENCE, 1, 2, 3.

COPY RIGHT.

1. If an article in a general compilation of literature and ſcience copies ſo much of a book, the copy-right of which is veſted in another perſon, as to ſerve as a ſubſtitute for it; though there may have been no intention to pirate it or to injure its ſale; this is a violation of literary property, for which an action will lie to recover damages. *Roworth* v. *Wilkes*, 94

2. The proprietor of a print may maintain an action againſt any perſon who pirates it, although his name is not inſcribed on it purſuant to the directions of ſtat. 8. G. 2. c. 13. §. 1. *ib*.

CORPORATION.

See EVIDENCE, 25. GAMEKEEPER, 1.

1. An action for uſe and occupation may be maintained by a corporation aggregate.

gate. *Dean and Chapter of Rocheſter* v. *Pierce*, 466

2. In ſuch an action by a Dean and Chapter, if the name of the preſent Dean is mentioned at the beginning of the declaration, and it is afterwards laid that the occupation was, "by the permiſſion of the *ſaid Dean* and Chapter," and it appears in evidence that the defendant occupied only in the time and by the permiſſion of *a former Dean*, this is a fatal variance. *Ib.*

COSTS.

In an action for malfeazance, whereby the plaintiff incurred coſts in judicial proceedings, if there is an order of another court for the defendant to pay the coſts of theſe proceedings to the plaintiff, he can neither recover, as ſpecial damage, the ſum at which they are taxed, nor the *extra* coſts as between himſelf and his attorney. *Hathaway* v. *Barrow*, 151

CRIM. CON.

See ACTION, 8.

CRITICISM.

See LIBEL.

CROSS ACTION.

See CONDITION PRECEDENT. QUANTUM MERUIT. SALE, 2.

D.

DECEIT.

See ACTION, 1. WITNESS 3.

DEDICATION TO PUBLIC.

See HIGHWAY.

DEED.

See EVIDENCE, 13, 14.

DEPOSITIONS.

See EVIDENCE, 16. WITNESS, 13.

DISTRESS.

See ACTION, 3.

DURESS.

See ACTION, 6, 7. BILLS OF EXCHANGE, 16.

E.

EJECTMENT.

See EVIDENCE, 20.

In ejectment by one tenant in common againſt another, it is neceſſary either to prove an actual ouſter, or to produce the conſent-rule to confeſs leaſe, entry, *and ouſter*. *Doe* v. *Cuff*, 173

EVIDENCE.

See BANKRUPT, 14, 15. BILLS OF EXCHANGE, 16, 30, 31, 32. INSURANCE, 27. LIBEL, 5, 6. VARIANCE. WITNESS.

1. If A. is convicted before a magiſtrate on the evidence of B.; although B's name does not appear on the conviction, he cannot avail himſelf of it in any civil proceeding between him and A. *Smith* v. *Rummens*, 9

2. If B. and C. are convicted of a conſpiracy, on the proſecution of A., the *conviction* is not admiſſible evidence in an action afterwards brought againſt them by A. for the ſame conſpiracy. *Hathaway* v. *Barrow*, 151

3. A. was examined before two magiſtrates on an information againſt B. for having ſmuggled ſpirits in his poſſeſſion; and was afterwards examined on the trial of an indictment againſt B. for aſſaulting revenue officers while they were attempting to ſeize the ſame ſpirits. On this laſt occaſion, A. ſwore that he had always given the ſame account of the tranſaction. Held, that the record of B.'s conviction on the information, in which A.'s evidence before the magiſtrates

magiſtrates was ſet out, was not legal evidence to contradict A., by ſhewing that he had given a different account of the tranſaction when firſt examined. *Rex* v *Howe*, 461

4. If a witneſs examined upon interrogatories, refers to a writing itſelf not evidence, as containing a ſtatement of the facts to which he is interrogated, this writing may be read as part of his depoſition. *Falconer* v. *Hanſon*, 171

5. When actionable words laid in the declaration are proved, other words actionable in themſelves may be given in evidence, to ſhew *quo animo* the former were ſpoken. *Ruſtell*, v. *Macquiſter*, 49 *n.*

6. Where, to an action at the ſuit of the indorſee againſt the maker of a promiſſory note, the defence is, uſury in its original concoction; letters from the payee to the maker, ſtating the conſideration as between them, if ſhewn to have been contemporaneous with the making of the note, are admiſſible evidence to prove the uſury. *Kent* v. *Lowen*, 177. 180. *d.*

7. To prove a preſcriptive right of fiſhery as appurtenant to a manor, old licences on the court rolls, granted by the lords of the manor, in conſideration of certain rents, to fiſh in the *locus in quo* are evidence, without proof of the rents being paid, if it appears that ſuch rents have being been paid in modern times, or that the lords of the manor have exerciſed other acts of ownerſhip over the fiſhery. *Rogers*, v *Allen*, 309

8. Upon an indictment for uttering a forged bank note, knowing it to be forged; to ſhew the priſoner's knowledge of the note mentioned in the indictment being a forgery, evidence is admiſſible of his having a ſhort time before uttered another forged bank note of the ſame manufacture, and of a number of others likewiſe of the ſame manufacture, with his hand writing on the back of them, having been in circulation. *Rex* v. *Bath*, 324

9. A memorandum ſigned by a perſon deceaſed, who had been owner of a copyhold tenement, and had occupied a ſlip of garden ground adjoining, ſtating that no part of the garden ground belonged to the copyhold, but that he paid rent for the whole of it, is admiſſible evidence for the leſſor of the plaintiff in an ejectment for this garden ground, to ſhew that it is not a part of the copyhold tenement. *Doe* v *Jones*, 367

10. If a witneſs anſwers queſtions to which he might have demurred as ſubjecting him to penalties, his anſwers may be uſed againſt him to all legal purpoſes; and therefore, in an action on 5 G. 2. c. 30. § 21. the defendant's examination before the commiſſioners may be given in evidence, to ſhew that by his own confeſſion he had concealed property of the bankrupt. *Smith* v. *Beadnell*, 30

11. To prove *the acts of ſtate* of a foreign government, copies ſhould be produced, examined by the public archives abroad. *Richardſon* v. *Anderſon*, 65 *n.*

12. *Semble*, that to prove a Jewiſh marriage, it is not enough to produce witneſſes who were preſent at the ceremony in the ſynagogue; but that the written contract between the parties ſhould be produced, and the execution of it proved. *Horn* v *Noel*, 61

13. In an action of debt on bond, an admiſſion of the hand writing of the atteſting witneſs preſumptively admits the delivery of the bond as the defendant's deed. *Milward* v. *Temple*, 375

14 If a deed purports to be executed by A. in the preſence of B. as atteſting witneſs; and B. ſwears truly that it was not executed by A. in his preſence,

presence, the deed cannot be proved by evidence of A's handwriting, or of an acknowledgment by A. that he had executed it. *Phipps* v. *Parker*, 412

25. To prove an examined copy of a record, it is insufficient for a witness to swear, that he examined the copy while another person read the original. *Reid* v. *Margiſon*, 469. *Gyles* v. *Hill*, 471 *n.* S. P.

26. A copy of depoſitions ſworn at a Judge's chambers, delivered out by his clerk, and atteſted by his ſignature is admiſſible evidence, without proof of its having been examined with the original. *Duncan* v. *Scott*, 101

17. If a verbal demand and a demand in writing are made at the ſame time, for the purpoſe of bringing an action of trover, and the one has no reference to the other, evidence of the verbal demand is ſufficient, without the production of the writing. *Smith* v. *Young*, 439

18. In an action for the value of an article ordered of the plaintiff by the defendant, but returned by the defendant to the plaintiff, it is incumbent on the plaintiff to prove, that it was made agreeably to the order. *Hayden* v. *Haward*, 180

19. In an indictment againſt defendants for a conſpiracy to cauſe themſelves to be believed perſons of large property, for the purpoſe of defrauding tradeſmen, the proſecutor may prove various inſtances of their giving a falſe repreſentation of their circumſtances, as overt acts of the conſpiracy. *Rex* v. *Roberts*, 399

20. In ejectment by deviſees of copyhold premiſes, to prove the admiſſion of the leſſors of the plaintiff, it is not only neceſſary to prove by the court-rolls, that perſons of their names have been admitted, but evidence muſt be given of their identity, *Doe* v. *Smith*, 196

21. The aſſignee of a leaſe, to ſhew his intereſt in the premiſes, is bound to prove the execution of the leaſe, and all the meſne aſſignments. *Croſby* v. *Percy*, 303

22. If A. refers B. for information upon any particular ſubject to C., what C. ſays concerning it, when applied to by B. or his agent, is evidence for B. in an action againſt A. *Williams* v. *Innes*, 364. *Daniel* v. *Pitt*, 366 *n.* *Brock* v. *Kent*, *Ib.*

23. In an action againſt the ſheriff for a falſe return to a writ, what was ſaid by the bailiff to whom the warrant under it was directed, when aſked by the plaintiff's attorney before the return of the writ, why he did not execute it, is evidence againſt the ſheriff. *North* v. *Miles*, 389

24. So of what the bailiff ſays, when after arreſting the perſon named in the writ he takes, him into another county. *Bowſher* v. *Calley*, 391 *n.*

25. In an action at the ſuit of a corporation, what is ſaid by an individual member of it, is not admiſſible evidence for the defendant. *Mayor of London* v. *Long*, 24

26. In aſſumpſit againſt a carrier for the non-delivery of written inſtruments, it is not neceſſary to prove a notice to the defendant to produce them, before giving parol evidence of their contents. *Jolley* v. *Taylor*, 143

27. If the defendant pleads to an action of debt on bond, that the bond was given for money won by gaming, and ſpecifies the name of the game at which the money was won, he muſt prove that the bond was given for money won at the particular game ſpecified. *Mazzinghi* v. *Stephenſon*. 291

28 In an action of treſpaſs againſt the ſheriff for ſeizing the plaintiff's goods, to connect the defendant with the treſpaſs, it is ſufficient to prove the warrant under which the goods were ſeized by the bailiff. *Grey* v. *Smith*, 387

29. In

29. In an action of aſſault and battery, if the declaration contains but one count, the plaintiff after proving one aſſault, cannot waive that, and proceed to give evidence of another. *Stante* v. *Pricket*, 473

30. If a defendant ſued by the name of A. pleads in abatement, that he was baptized by the name of B., he muſt prove that this name was given him by baptiſm, and it is not enough for him to ſhew, that he has always been known and called by the name of B. *Weleker* v. *Le Pelletier*, 479

EXECUTORS AND ADMINISTRATORS.

1. Where at a meeting of the creditors of a deceaſed inſolvent, called by his executor, they agree to a rateable diſtribution, on the faith of which he executes a deed of aſſignment of all the aſſets which have come to his hands, for the benefit of the creditors; one of them cannot afterwards refuſe to come in under the deed, and bring an action for his debt againſt the executor. *Brady* v. *Sheil*, 147

2 The creditors of a deceaſed inſolvent may be compelled to ſubmit to rateable diſtribution of his effects. *Ib.* 148

F

FACTOR.

See PRINCIPAL AND AGENT.

FALSE IMPRISONMENT.

See TRESPASS, 1, 2.

FALSE PRETENCES.

1. Where the defendant being a porter delivered along with a *baſket of fiſh* a falſe ticket denoting that 9s. 10d., inſtead of 6s. 6d. was to be paid for it; *held* that in an indictment for this offence, on 30 G. 2. c. 21. the baſket of fiſh might be deſcribed as *a parcel*; but that if the indictment had been on 39 G. 3. c. 58, which enumerates *baſkets*, *parcels*, &c. ſpecifically, this would have been a fatal variance. *Rex* v. *Douglaſs*, 212

2. If an indictment on 30 G. 2. c. 24. avers, that the defendant under falſe pretences obtained a ſum of money, being the proper monies of A., and it appears in evidence that the money was obtained from B. acting as A.'s ſervant, who had not *then* in his poſſeſſion any money belonging to A. but *afterwards* was repaid by him the ſum delivered to the defendant, this is a fatal variance. *Aliter*, if B. at the time had in his poſſeſſion a ſum belonging to A. equal to that delivered to the defendant. *Ib.* 213

3. Stat. 39 G. 3. c. 58. is only cumulative in its proviſions, and does not take away the modes of puniſhing offences therein mentioned, which exiſted previouſly to the paſſing of the act. *Ib.* 214

FISHERY.

See EVIDENCE, 7. PLEADING, 3.

1. A preſcriptive right to a ſeveral fiſhery in a navigable river may paſs as appurtenant to a manor. *Rogers* v. *Allen*, 312

2. A right of fiſhery is diviſible, and may be loſt as to part, and preſerved as to part. Therefore an excluſive right to dredge for oyſters in a navigable river may ſubſiſt as appurtenant to a manor, although it be lawful for all the king's ſubjects to catch floating fiſh therein, *Ib.*

FOREIGN ATTACHMENT.

See STOPPING IN TRANSITU, 2.

FOREIGN JUDGMENT.

1. No action will lie upon a foreign judgment, on the face of which it appears, that the defendant, not reſident within the juriſdiction of the

foreign court, was neither ſerved with proceſs, nor came in to defend the action; although ſuch judgment may have been obtained according to the courſe and practice of the court in ſimilar caſes. *Buchanan* v. *Rucker*, 63. 180 *b*.

2. Aſſumpſit will not lie on a decree of a foreign court, whereby the defendant is ordered to pay a certain ſum of money to the plaintiff on a certain day, *firſt deducting thereout the defendant's coſts to be taxed by the proper officer*; where the defendant's coſts have not been taxed, either at his own requeſt, or upon an *ex parte* proceeding at the inſtance of the plaintiff. *Sadler* v. *Robins*, 253

FOREIGN SENTENCE.

See INSURANCE, 25, 26.

FORGERY.

See EVIDENCE, 8. BILLS OF EXCHANGE, 17.

FRAUDS STATUTE OF.

1. If the purchaſer of goods, at the time of the ſale, write his name upon a particular article, with intent to denote that he has purchaſed it, and to appropriate it to his own uſe, this is enough to take the ſale, as to the article written upon, out of the ſtatute of frauds, but not as to other articles bought at the ſame time. *Hodgſon* v. *Le Bret*, 233

2. So where wine was ſold in the caſk, held, that cutting off the *ſpills* and marking the purchaſer's initials on the caſks, took the caſe out of the ſtatute. *Anderſon* v. *Scot*, 235 *n*.

3. An agreement in writing, by which the defendant undertook to guarantee the payment of any goods which the plaintiff ſhould deliver to a third perſon, ſufficiently expreſſes the conſideration for the defendant's undertaking, to render the agreement binding, under the 4th ſection of the ſtatute of frauds; although it contains no promiſe on the part of the plaintiff to deliver goods, and no action would have lain upon it againſt him. *Siapp* v. *Lill*, 242

4. Where goods were ſold by auction to an agent, the auctioneer wrote the initials of the agent's name, together with the prices, oppoſite the lots purchaſed by him, in the printed catalogue; and the principal afterwards, in a letter to the agent, recognized the purchaſe. Held, that the entry in the catalogue and the letter, coupled together, were a ſufficient memorandum of the contract within the ſtatute of frauds. *Phillimore* v. *Barry*, 513

5. A parol aſſignment of a leaſe from year to year, granted by parol, is void under the ſtatute of frauds, 29 Car. 2. c. 3. *Botting* v. *Martin*, 318

FRAUDULENT ASSIGNMENT.

1. An aſſignment of perſonal property is void as againſt creditors, unleſs there be a complete change of poſſeſſion; and it is not enough that a perſon is put in to keep poſſeſſion *jointly* with the aſſignor. *Wordall* v. *Smith*, 333

2. If A. claiming goods under a fraudulent bill of ſale from B., bring trover againſt C. for taking them in execution as belonging to B., C. muſt prove the judgment againſt B. although the ſale from B. to A. was merely colourable and void as againſt creditors. *Steel* v. *Brown*, 512 *n*.

FREIGHT.

See INSURANCE, 11, 22.

Although freight ſhould be made payable by the ſhipper *on the ſhipment of the*

the goods, it is not merely on that account earned, without a performance of the voyage. *Maſhiter* v. *Buller*, 84

G

GAMEKEEPER.

1. Bodies corporate who are lords of manors, are not prevented by ſtatute 3 Geo. 1. c. 11. from appointing unqualified perſons their gamekeepers. *Spurrier* v. *Vale*, 457
2. A deputation to a gamekeeper, who is neither himſelf qualified to kill game, nor is a ſervant to the lord of the manor, need not ſtate on the face of it, that he is appointed to kill game for the uſe of the lord; and it will be preſumed, that whatever game he kills, is for the lord's uſe, till the contrary is proved. *Ib.*

H

HIGHWAY.

1. If a paſſage leading from one part to another of a public ſtreet (though by a very circuitous route), made originally for private convenience, has been open to all the world for a great number of years, without any bar or chain acroſs it, and without any perſon paſſing through it meeting with interruption, it is to be conſidered as *dedicated to the public*, and it becomes a highway, to obſtruct which is an indictable offence. *Rex* v. *Lloyd*, 260
2. But the erection of a bar, although it may have been knocked down, rebuts the preſumption of a dedication to the public. *Roberts* v. *Karr*, 262 *n.* *Lethbridge* v. *Winter*, 263 *n.*

I

IMMORAL CONSIDERATION.

See ACTION, 5. AGREEMENT.

INDEBITATUS ASSUMPSIT.

See PLEADING, 2. MONEY HAD AND RECEIVED, 3.

INFANT.

An infant cannot accept a bill of exchange for neceſſaries. *Williamſon* v. *Watts*, 552

INSURANCE.

1. A *repreſentation* made by an inſurance broker, when the names of the underwriters are put upon a ſlip, is binding on the aſſured, unleſs qualified or withdrawn by ſome communication upon the ſubject, between that time and the execution of the policy. *Edwards* v. *Footner*, 530
2. If the owner of a ſhip receives a letter from the captain, written on her arrival in a foreign port, giving ſuch an account of her as to render it probable that ſhe muſt remain there for the purpoſe of being repaired, beyond the time that would be neceſſary for her to take in her cargo; this letter need not be communicated to the underwriters, in effecting a policy of inſurance upon her, at and from the foreign port to a port in England; unleſs information on the ſubject be particularly called for. *Beckwith* v. *Sydebotham*, 116
3. According to the uſage of the Newfoundland trade, when ſhips arrive on the coaſt they are either employed for ſome time in fiſhing (called *banking*) or they make an intermediate voyage in the American ſeas, before beginning to take in their homeward cargo, during which they are protected by a ſeparate policy. Therefore, in effecting

ing a policy, "*loſt or not loſt at and from Newfoundland to a port in Europe*," although the ſhip is to be employed in *banking*, it is not neceſſary to diſcloſe the fact to the underwriters, as their riſk only commences from the time when the *banking* ends, and they are bound to know the nature and circumſtances of the branch of trade to which the policy relates.—If the uſage is general, it makes no difference for this purpoſe, that it is not uniform. *Vallance* v. *Dewar*, 503

4. Nor where the ſhip is to take an intermediate voyage, is it neceſſary to diſcloſe this to the underwriters. *Ougier* v. *Jennings*, 505 *n.*

5. So the uſage being for ſhips to load a part of their cargo without ſide the bar of Oporto, a ſhip inſured at and from that place, may do ſo, without leave being given by the policy, or any diſcloſure being made upon the ſubject. *Kingſton* v. *Knibbs*, 508 *n.*

6. If A. in conſideration of a premium, undertakes to inſure B. againſt being drawn for the militia under a particular ſtatute, until a certain day; and repreſents that on that day all balloting under the ſtatute will ceaſe, and that B. will be completely ſecured by the inſurance againſt the operation of the ſtatute,—A. is not thereby bound to indemnify B. in conſequence of his being drawn for the militia under the ſtatute, after the above mentioned day: But, on account of the miſrepreſentation, the contract is void, and B. may recover back the premium, as money had and received. *Duffell* v. *Wilſon*, 401

7. If a policy of inſurance is altered as to the ſubject matter inſured, after the riſk has attached, without having been re-ſtamped, it is not only void as altered, but it is completely vitiated, and ceaſes to be available to any legal purpoſe. *French* v. *Patten*, 12. 180 *b.*

8. In a policy of inſurance the perſons intereſted were denominated "The truſtees of Meſſrs. K., F., and Co." Held that this might be conſidered their uſual ſtile and firm of dealing within ſtat. 28 G. III. c. 56, § 1. *Hibbert* v. *Martin*, 538

9. *Semble*, that an inſurance on goods the property of a neutral, to a port occupied by the enemy is void.—But though a neutral ſhould himſelf be reſident in a place occupied by the enemy, an inſurance on goods his property to a neutral or friendly port is valid. *Bromley* v. *Heſeltine*, 75

10. A voyage from this country to a place ſurrendered to his Majeſty's arms, commenced after the period at which, according to articles of capitulation publiſhed in the London Gazette, it was to be reſtored to the enemy, and after in fact it was reſtored, is not illegal, if intelligence of that event had not reached England when the ſhip ſailed, and the object of the adventure was not a trading with the enemy. *Atkinſon* v. *Abbott*, 535

11. The owner of a ſhip ſent her to St. Domingo, with a cargo to be bartered for goods there, which ſhe was to bring back to England. When a ſmall part of the outward cargo had been unloaded, and bartered for goods which were put on board, the ſhip was loſt; but the remainder of the outward cargo was ſaved, and bartered for other goods, which would have formed a ſufficient cargo for the ſhip, if ſhe could have performed the homeward voyage. Held, that the underwriters on a policy on the ſhip's freight, *at and from St. Domingo*, were only liable for the freight of the homeward goods that were on board when the ſhip periſhed. *Forbes* v. *Cowie*, 520

12. A. reſiding in Dublin having agreed with B. and C. at Jamaica to ſend out two ſhips annually, for which they

they were to provide cargoes to be conſigned to him, chartered a ſhip which was to proceed from Briſtol to St. Thomas's, where ſhe was to deliver an outward cargo, (the property of another perſon,) and from thence to Jamaica, where ſhe was to take in a cargo from B. and C. for Dublin; and by the terms of the charter-party, A., in conſideration of guaranteeing the homeward cargo, was to receive a commiſſion of 2½ per cent. upon the homeward freight. The ſhip was captured on her paſſage from St. Thomas's to Jamaica. Held, that A. had not then an inſurable intereſt either in the commiſſion on the freight, or in the commiſſion on the ſale of the homeward cargo. *Knox* v. *Wood*, 543

13. A ſhip, to be ſea-worthy, muſt be rendered as ſecure as poſſible from *capture*, as well as from the perils of the ſea. *Wedderburn* v. *Bell*, 1

14. If through the negligence of the owner of a ſhip inſured, the mariners baratrouſly carry ſmuggled goods on board, whereby the ſhip is ſeized as forfeited, the underwriters are not liable for the loſs. *Pipon* v. *Cope*, 434

15. If a ſhip is juſtly ſeized as forfeited for ſmuggling, and afterwards reſtored, the underwriters are not liable for any damage happening to the ſhip by the perils of the ſea, in the interval between the ſeizure and reſtoration, *Ib.*

16. If a ſhip with goods on board inſured to a foreign port, learning in the courſe of her voyage, that an embargo is there laid on all ſhips of her nation, waits at ſome place as near thereto as ſhe ſafely can, till the embargo is removed, the goods will in the mean time be protected by the policy, while the voyage remains legal: But if ſhe might, upon ſuch an occaſion, put into a friendly port adjoining to her port of deſtination, and inſtead of doing ſo, ſhe ſails back for her port of outfit, and is loſt, ſhe will be conſidered as having abandoned the voyage inſured, and the underwriters will be diſcharged. *Blackenhagen* v. *The London Aſſurance Company*, 454

17. Leave granted in a policy of inſurance on a fiſhing voyage *to ſee prizes into port*, does not authorize the ſhip to remain in port till a prize receives neceſſary repairs, which ſhe could not otherwiſe have had: and at moſt extends to ſeeing the prize moored ſafely, and giving the neceſſary orders for her final deſtination. *Jarratt* v. *Ward*, 263

18. The underwriters on a policy of inſurance are not diſcharged by an act on the part of the aſſured, which to a certain degree encreaſes the riſk, if it does not amount to culpable negligence. Therefore, where three Spaniſh priſoners of war were received on board a ſhip, and allowed the free range of it, who might have been reaſonably expected to conduct themſelves peaceably during the voyage, but who joined in a mutiny, and aſſiſted to run away with the ſhip, the underwriters were held liable for a loſs ſo happening. *Toulmin* v. *Inglis*, 421

19. If the captain of a ſhip inſured burns her, to prevent her from falling into the hands of the enemy, this is a loſs by *fire* within the meaning of the policy. *Gordon* v. *Rimington*, 123

20. A policy on goods is not vitiated by the ſhip violating the convoy act, without the privity of the aſſured. *Edwards* v. *Footner*, 530

21. If an inſurance broker requires the underwriters upon a policy, to ſettle as for a total loſs, and to give directions for the diſpoſition of the property inſured, this does not amount to an *abandonment*. *Parmater* v. *Todhunter*, 541

22. There

22. There must be an abandonment of freight where the goods specifically exist, although the ship is incapable of prosecuting the voyage, *Ib.*

23. An underwriter who, upon a full disclosure of facts, has signed his initials to an adjustment on the policy without paying the loss, is not precluded afterwards, in an action against him, from taking advantage of circumstances, with which he had been made acquainted, before signing the adjustment. *Herbert* v. *Champion*, 134

24. An *adjustment* is not binding on an underwriter, although at the time of signing it he had the means of rendering himself acquainted with the history of the voyage and the manner of the loss, if his attention was not then drawn to circumstances he afterwards learns, by which the underwriters were discharged. *Shepherd* v. *Chewter*, 274

25. The sentence of a foreign court of admiralty is evidence only of what it positively and specifically affirms in the adjudicative part of it,—not of what may be gathered from it by way of inference. *Fisher* v. *Ogle*, 418

26. The sentence of a court of admiralty, sitting under a commission from a belligerent power, in a neutral country, will not be recognized in our courts; and that is to be considered a neutral country for this purpose, in which the forms of an independent neutral government are preserved, although the belligerent may have such a body of troops stationed there, as in reality to possess the sovereign authority. *Donaldson* v. *Thompson*, 429

27. In an action by the assured against an underwriter for a return of premium, the policy is conclusive evidence of the receipt of the premium by the defendant. *Dalzell* v. *Mair*, 532

28. If an insurance broker, when a loss happens upon a policy which he has effected, pays the assured the full amount of the money subscribed, he cannot recover back any part of it, upon the ground that before the loss happened one of the underwriters upon the policy had become insolvent, and that he was not aware of this fact when he paid the money. *Edgar* v. *Bumstead*, 411

29. If the owner of a ship insured hears that she is captured, and thereupon gives notice of abandonment to the underwriters, the abandonment stands good, and he may proceed as for a a total loss, if she was actually once captured, although he knows of her being recaptured before action brought. *Bainbridge* v. *Neilson*, 237

Reversed on special case, M. T. 49 G. III. 564. *n.* 2.—10 East, 329.

INSURANCE BROKER.

See PRINCIPAL AND AGENT, 8, 9. INSURANCE, 28.

INTEREST.

1. In an action for money had and received, the plaintiff is not entitled to interest, even from the time of making a demand of the principal; unless, 1st, he give in evidence an express promise to pay interest; or 2dly shew something from which such a promise may be inferred; or 3dly, prove that the money has been used by the defendant, and interest has been made of it. And *comme semble*, the only other instance in which interest is recoverable, is upon a contract for the payment of money on a certain day, as on bills of exchange, promissory notes, &c. *De Havilland* v. *Bowerbank*, 50

2. Although money has been obtained fraudulently, interest will not be allowed upon it on that account, in an action of assumpsit to recover it back. *Crockford* v. *Winter*, 129

3. In an action on a policy of insurance, the

the plaintiff cannot recover intereſt upon the ſum inſured. *Kingſton* v. *M'Intoſh*, 518

4. Intereſt given on the balance of an account, where it appeared from the account that intereſt had been allowed on former balances. *Nichol* v. *Thompſon*, 52 *n.*

INTIRETY OF CONTRACT.

See PLEADING, 2. SALE, 5.

JUDGMENT.

See FOREIGN JUDGMENT, 1, 2. PRESUMPTION, 2.

K.

KENSINGTON PALACE.

Proceſs cannot be lawfully executed in Kenſington Palace. *Winter* v. *Miles*, 475 *n.*

L.

LANDLORD AND TENANT.

See WASTE, 1, 2.

LIBEL.

See SLANDER.

1. It is not libellous to ridicule a literary compoſition or the author of it, in as far as he has embodied himſelf with his work; and if he is not followed into domeſtic life for the purpoſes of perſonal ſlander, he cannot maintain an action for any damage he may ſuffer in conſequence of being thus rendered ridiculous. *Sir John Carr, Knt.* v. *Hood*, 355 *n.*

2. So, though it is an aggravated miſdemeanor to publiſh an invective againſt judges and juries, with a view to bring into ſuſpicion and contempt the adminiſtration of juſtice in the country, ſtill it is lawful with candour and decency to diſcuſs the merits of the verdict of a jury, or the deciſions of a judge. *Rex* v. *White*, 359 *n.*

3. In an action for a libel upon the plaintiff in his buſineſs of a bookſeller, accuſing him of being in the habit of publiſhing immoral and fooliſh books, the defendant, under the plea of *not guilty*, may adduce evidence to ſhow that the ſuppoſed libel is a fair ſtricture upon the general run of the plaintiff's publications. *Tabart* v. *Tipper*, 350

4. Although it is lawful for an author to animadvert upon the conduct of a bookſeller in publiſhing books of an improper tendency, it is actionable falſely to impute to him the publication of any immoral or abſurd literary production *Ib.* 554

5. In an indictment for a libel, the poſtmark of a particular place within the county in which the venue is laid, upon a letter contaiuing the libel, is not ſufficient evidence of a publication there by the defendant. *Rex* v. *Watſon*, 215

6. If a libellous letter is ſent by the poſt, addreſſed to the proſecutor at a place out of the county, in which the venue is laid in an indictment for the libel, ſtill if it was firſt received by him within that county, this is a ſufficient publication by the defendant to ſupport the indictment. *Ib.* 218

LIEN.

1. If a man gets poſſeſſion of a thing by miſrepreſentation, he cannot retain it, as having a lien upon it; although under the circumſtances, he might have done ſo, had he come by it fairly. *Madden* v. *Kempſter*, 12

2 *Semble.* That if A. is under acceptance to B. he may retain money of B.'s in his hands to diſcharge it, either until the bill is delivered up to him, or until he receives a bond of indemnity againſt being ſued upon it. *Ib.*

3. If one having a lien upon goods, when they are demanded of him, claims to retain them upon a different ground, making no mention of the lien, trover may be maintained againſt him, without evidence of any tender having been made of the amount of his lien. *Boardman* v. *Sill*, 410 *n.*

LIMITATIONS, STATUTE OF.

1. In an action againſt a huſband for goods ſupplied to his wife, for her accommodation while he occaſionally viſited her, a letter written by the wife acknowledging the debt within ſix years, is admiſſible evidence to take the caſe out of the ſtatute of limitations. *Gregory* v. *Parker*, 394.

2. If the captain of a ſhip inſured barratrouſly carries her out of the courſe of the voyage, procures her to be condemned in a vice-admiralty court, ſells her, and delivers her up to the purchaſer, it is only from this laſt event that the ſtatute of limitations begins to run as between the aſſured and the underwritter. *Hibbert* v. *Martin*, 539.

M.

MALICIOUS ARREST.

1. If in an action for a malicious arreſt, the declaration avers that B the defendant, had no cauſe of action againſt A. the plaintiff to the amount of 10*l.* and it appears that A. was indebted to him above that ſum, although not nearly to the amount ſworn to in the affidavit to hold to bail; the action cannot be ſupported; as A. ſhould have declared againſt B for maliciouſly holding him to bail for a greater ſum than was really due. *Wetherden* v. *Embden*, 295. *Wilkinſon* v. *Mawbey*, 297

2. But if in fact B. was largely indebted to A. on a balance of accounts, and had only a croſs demand upon him for a different cauſe from that mentioned in the affidavit to hold to bail, then the above averment is not falſified, as in that caſe A. did not owe B. 10*l.* and B had no cauſe of action for which he could lawfully hold A. to bail. *Wetherden* v. *Embden*, *Ib.*

MALICIOUS PROSECUTION.

1. In an action for a malicious proſecution, the plaintiff muſt give poſitive evidence of *the want of probable cauſe*, although the defendant dropped the proſecution, and did not appear when the indictment came on to be tried. *Purcel* v. *M'Namara*, 199

2. So the *want of probable cauſe* muſt be proved, although the bill was thrown out by the grand jury. *Sykes* v. *Dunbar*, 202 *n.*

3. Or although there be evidence of *malice* in the proſecutor. *Incledon* v. *Berry*, 203 *n.*

4. Or although the defendant, after binding the plaintiff over to the ſeſſions, did not appear to prefer an indictment againſt him. *Wallis* v. *Alpine*, 204 *n.*

MASTER AND SERVANT.

See STAGE COACH.

If A. while employed as maſter of a ſhip, of which B. is the owner, gives part of his perſonal ſervices to C for a ſtipulated ſum, and C. pays this into the hands of B., an action to recover it cannot be ſupported againſt B. at the ſuit of A. *Thompſon* v. *Havelock*, 527

MONEY HAD AND RECEIVED.

1. If money has been obtained by means of a fraud, an action for money

money had and received lies to recover it back; to which it is no answer that the defendant is really entitled to the money, if his right to it depends upon a question not of common law jurisdiction. *Crockford* v. *Winter*, 124

2. A. as the agent of B. the owner of a landed estate, enters into an agreement for the sale of it with C., who appears to act on his own account, but in fact is the agent of D., and A. and C. bind themselves in a penalty for the performance of the agreement, whereupon C. pays A. part of the purchase-money as a deposit. *Held* that upon a breach of the conditions of sale on the part of the vendor, an action for money had and received lies at the suit of D. against B. to recover back the deposit, without proof of the money being paid over by A. to B. *Duke of Norkfolk* v. *Worthy*, 337

3. Where the plaintiff subscribed articles of agreement under seal, between the captain of a ship and the mariners, whereby in consideration of their serving faithfully in a fishing voyage to the South Seas and back again, they were each to receive a certain share of the nett proceeds of the cargo brought home, and the defendant, as owner of the ship, was appointed agent to dispose of the cargo for the benefit of all concerned; held that *money had and received* would not lie against the defendant to recover the plaintiff's share of the nett proceeds, on proof that the defendant had disposed of the cargo, and that the price of it had come to his hands; without evidence of an acknowledgment that the plaintiff had done his duty during the voyage, and was entitled to his stipulated share of the proceeds. *Evans* v. *Bennett*, 300

4. A. having accepted bills of exchange for B.'s accommodation, B. by way of collateral security, lodges in his hands a bill of lading of certain goods deliverable to C. who had no interest in them. A. pays his acceptances, and B. being indebted to him to that amount, becomes bankrupt. D. gets possession of the goods, and sells them.—Held that A. might maintain an action for money had and received against D. to recover the proceeds. *Faveau* v. *Hullet*, 554

5. In an action for money had and received, by the holder of a bill of exchange, against a person who has received a sum of money from the acceptor to satisfy it, any defence may be set up which would be available, if the action had been brought against the acceptor himself. *Redshaw* v. *Jackson*, 372

N.

NAVIGABLE RIVER.

1. The owner of a vessel sunk in a navigable river, is bound to place a *buoy* over the wreck, and it is not enough to station a watchman near the spot to point out the danger. *Harmond* v. *Pearson*, 515

2. If an individual has a right of fishery in a navigable river, it is subject to the right of the public to use the river for all the purposes of navigation. *Anon.* 517 *a*.

NEGLIGENCE.

See STAGE COACH.

NEUTRALS.

See ALIEN ENEMY. INSURANCE, 9.

NONSUIT.

1. The plaintiff may be nonsuited in an issue out of chancery, as well as in other cases. *Barnes* v. *Headley*, 164

2. In *Scire facias* the plaintiff may be nonsuited. *O'Mealey* v. *Wilson*, 484

3. *Held*

3. *Held*, that after a plea of tender the plaintiff cannot be nonsuited. *Harding* v. *Spicer*, 327
4. Although an objection appear upon the record, and might be taken advantage of by motion in arrest of judgment or writ of error, yet if it be of such a nature, that the action clearly cannot be maintained, the judge at *Nisi Prius* will nonsuit the plaintiff. *Sadler* v. *Robins*, 256

NOTICE TO PRODUCE.

See EVIDENCE 26.

ORDER, JUDGE'S.

See PRACTICE, 6.

P

PARTICULAR OF DEMAND.

1. Although the plaintiff, after delivering a *particular* of his demand, cannot at the trial himself give evidence out of it, yet if the defendant's evidence shews that there were other items, which he might have included in his demand, he is entitled to recover all that appears to be due to him. *Hurst* v. *Watkis*, 68
2. If the plaintiff's *particular* conveys the requisite information to the defendant, however inaccurately it be drawn up, it is sufficient. *Day* v. *Bawer*, 69 *n.*
3. In an action for money had and received, at the suit of a purchaser against the vendor of an estate, to recover back the deposit, the conditions of sale not being complied with, the defendant, by a judge's order, may obtain *a particular* of the grounds on which the plaintiff seeks to recover back the deposit; to which the latter will be confined at the trial. But if there has been no *particular*, the plaintiff may entitle himself to a verdict by proving an infraction of the conditions of sale, never before mentioned to the defendant. *Squire* v. *Tod*, 293

PARTNERS.

See BILLS OF EXCHANGE, 2, 3. 30, 31.

1. Where one of two partners, with the intention of cheating the other, goes to a shop and purchases articles such as might be used in the partnership business, which he instantly converts to his own seperate use, if there was no collusion between him and the seller, this is to be considered a partnership transaction, and the innocent partner is liable for the price of the goods, without proof of any previous dealings between the parties. *Bond* v. *Gibson*, 185
2. If there is an agreement between A. the sole owner of a lighter, and B. a lighterman, that B. shall work the lighter, and that the nett profits made by her shall be equally divided between them, A. and B. are partners in this concern, and B. as well as A. is liable for repairs done to the lighter:—But if the agreement between them is, that B. in consideration of working the lighter shall have half her *gross earnings*, this does not constitute a partnership, being only a mode of paying B. for his labor. *Dry* v. *Boswell*, 329
3. If A. purchase bullocks and put them to depasture on B.'s ground, it being agreed that the profits upon a resale above the prime cost should be equally divided, this does not constitute a partnership as to the bullocks, and upon a resale, A. may maintain an action for the price of them in his own name, *Wish* v. *Small*, 331 *n.*
4. Where there was a stipulation between A. B. and C. who appeared to the world as co-partners, that C. should

ſhould not participate in the profit and loſs, and ſhould not be liable as a partner, held that C. was not liable as ſuch to thoſe who had notice of this ſtipulation, and that notice to one member of a firm was notice to the whole partnerſhip. *Alderſon* v. *Pope*, 404 *n.*

PAYMENT OF MONEY INTO COURT.

1. Proof of the rule to pay money into court will entitle the plaintiff to a verdict with nominal damages, unleſs the defendant prove that he has paid the coſts under the rule purſuant to the maſter's allocatur. *Horſburgh* v. *Orme*, 558 *n.*
2. So if after action brought, the money ſought to be recovered is paid without a rule of court, the plaintiff muſt have a verdict. *Atkinſon* v. *Thornton*, 559 *n.*
3. In an action on a valued policy of inſurance, the payment of money into court upon a count which ſtates a total loſs by capture, is no admiſſion of a total loſs, and the plaintiff is bound to prove that he has ſuffered damage from the capture beyond the amount of the ſum paid into court. *Rucker* v. *Palſgrave*, 557

PENALTY.

In an action on an agreement to ſerve the plaintiff under a penalty, the jury cannot exceed the penalty in damages, and within it, are only to give the plaintiff a compenſation for the loſs he proves he has ſuffered. *Wilbeam* v. *Aſhton*, 78

PERJURY.

See VARIANCE, 6.

PLEADING.

1. In an action for a libel, if ſeparate paſſages of the libel are to be ſet out in one count of the declaration, they ought to be deſcribed as ſeparate and diſtinct from each other. *Tabart* v. *Tipper*, 352
2. By an agreement between the plaintiffs and the defendant, the defendant was to accept of the aſſignment of the leaſe of a farm from the plaintiffs, and to take the fixtures and crops at valuation. He was afterwards let into poſſeſſion of the fixtures, and the crops were valued to him; but the leaſe was never aſſigned. Held that *indebitatus aſſumpſit* would not lie for the price of the fixtures and crops, and that the plaintiff's only remedy was by a ſpecial action on the agreement. *Neal* v. *Viney*, 471
3. In treſpaſs for breaking and entering a ſeveral fiſhery, if the plaintiff preſcribes for the ſole and excluſive right of fiſhing over four places in a navigable river, upon which right iſſue is joined, the preſcription muſt be proved as extenſive as it is laid; and if the right is ſhown to exiſt over three of theſe places, but not the fourth, this is a fatal variance, notwithſtanding that the treſpaſſes complained of were committed in a part of the river where the ſole and excluſive right of fiſhery preſcribed for is proved to exiſt. *Rogers* v. *Allen*, 313
4. Averment in a declaration that plaintiff was poſſeſſed of premiſſes *for the remainder of a certain term of years then unexpired therein*, which he agreed to aſſign to the defendant, is ſupported by evidence of a tenancy from year to year. *Botting* v. *Martin*, 317

POLICY.

See INSURANCE. BANKRUPT, 9.

POSTEA.

See PRACTICE, 3.

PRACTICE.

1. The nisi prius record may be amended in court after the cause is called on, by a rule made *instanter* with the consent of both parties. *Murphy* v. *Marlow*, 57

2. If a party coming to attend the trial of his cause, is arrested, the Judge at nisi prius will grant a *habeas corpus* to discharge him; and will put off the trial until he is released, without payment of costs, if any collusion can be shewn to exist between the opposite party and the creditor who arrested him; otherwise, only upon payment of costs. *Solomon* v. *Underhill*, 229

3. Where the defendant has a set-off against the plaintiff, of which he gives notice under the statute, but does not appear at the trial to offer evidence of it, the plaintiff may either take a verdict for the whole sum he proves to be due to him, subject to be reduced to the sum really due on a balance of accounts, if the defendant will afterwards enter into a rule not to sue for the set-off; or he may take a verdict for the smaller sum, with a special indorsement on the postea, as a foundation for the court to order a stay of proceedings, if another action should be brought for the amount of the set-off. *Laing* v. *Chatham*, 252

4. In a penal action, where there has been a verdict for the defendant, the court will not grant a new trial, except for a misdirection of the Judge. *Brooke, q. t.* v. *Middleton*, 450

5. A Judge at *nisi prius* will not try a a cause out of its order, for the purpose of preventing an *injunction* in equity against proceeding to trial. *Goldschmidt* v. *Marryat*, 559

6. In policy causes a Judge at chambers will make an order for the assured to produce upon affidavit to the underwriters, all papers in the possession of the former relative to the matters in issue. *Ib.* 561

PREMIUMS OF INSURANCE.

See INSURANCE, 27.

PREROGATIVE.

It is part of the ancient prerogative of the crown, as incident to the duty of customs, to appoint officers to gauge all gaugeable articles imported into the kingdom, whether for sale or otherwise. *Mayor of London* v. *Long*, 26

PRESCRIPTION.

See FISHERY, 1. PLEADING, 3.

PRESUMPTION.

1. To raise the presumption that a bond has been satisfied, there must be a lapse of the full period of 20 years from its becoming forfeited; unless there be some additional circumstance, as an intermediate settlements of accounts between the parties. *Colsell* v. *Budd*, 27

2. The presumption arising from lapse of time, of a judgment being satisfied, is not rebutted by evidence of the defendant having been in extremely embarrassed circumstances, and in the opinion of those who knew him, incapable of paying the debt secured by the judgment. *Williams* v. *Gorges*, 217

3. Where there has been no fraud on the part of the defendant, the presumption of law is against the demand of the plaintiff. *Clemmes* v. *Pezzey*, 8

PRINCIPAL AND AGENT.

1. An agent proved to have authority to sign a policy, will be presumed to have authority to adjust it. *Richardson* v. *Anderson*, 43 n.

2. If an order is given to an agent to deliver

deliver up any thing of which he had the management, his agency respecting it ceases as soon as he has delivered it up; and if he afterwards lays out money upon it for the benefit of the owner, this is a voluntary payment. *Edmiston* v. *Wright*, 88

3. If an agent for the sale of horses sells to A., in one lot and at an entire price, a horse belonging to B. and another belonging to C., warranting both horses to be sound; A. cannot maintain assumpsit against B. for the unsoundness of the horse which belonged to the latter, declaring as upon a sale of one horse; since the contract concerning the two horses was entire. *Symonds* v. *Carr*, 361

4. An agent employed generally to do any act, is authorised to do it only *in the usual way of business*. Therefore as stock is sold usually for ready money only, a broker employed to sell stock cannot sell it upon credit, without a special authority, although acting *bonâ fide*, and with a view to the benefit of his principal. *Wiltshire* v. *Sims*, 258

5. If the owner of goods allows the broker through whom he sells them, to sell them as a principal, the purchaser of goods so sold is discharged by payment to the broker in any way which would have been sufficient, had he been the real owner. *Coates* v. *Lewis*, 444

6. If goods are bought by a broker, who does not mention his principal until he himself has become insolvent, the principal cannot set off the price of the goods against a debt due to him from the broker, but is still liable to the vendor. *Waring* v. *Favenck*, 85

7. If goods are bought by a broker, the principal is liable to the vendor, if called upon when payment becomes due; although he has previously paid the price of the goods to the broker. *Q.*—*Secus*, if the day of payment is allowed to pass by, whithout any demand being made upon the principal. *Kymer* v. *Suwercropp*, 109. 180 *c*.

8. If a merchant orders an insurance broker to effect a policy of insurance for him on a cargo of corn, without giving any directions as to those with whom the policy is to be effected, and the insurance broker effects the policy with one of the chartered companies, by whose policies corn is warranted against partial losses, although the ship be stranded;—upon a large partial loss happening upon this cargo after a stranding of the ship, the merchant cannot maintain an action against the insurance broker for not effecting the policy with private underwriters, who, by the common form of a policy of insurance, would have been liable for this partial loss. *Comber* v. *Anderson*, 523

9. Although an insurance broker is bound to obey the positive directions of the assured to abandon, yet if it is referred to his discretion, whether to abandon or not, and he acts *bonâ fide*, he is not liable to an action for neglecting to abandon. *Ib.* 525

PRINTS.

See COPYRIGHT.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PUBLIC COMPANIES.

See BUBBLE ACT.

Q

QUANTUM MERUIT.

See ACTION, 2.

Where the plaintiff declares on a *quantum meruit* for work and labour done and materials found, the defendant may reduce the damages by ſhewing that the work was improperly done; and may entitle himſelf to a verdict by ſhewing that it was wholly inadequate to anſwer the purpoſe for which it was undertaken to be performed. *Farnſworth* v. *Garrard*, 38

R

RECEIPT.

See STAMPS, 1, 2. INSURANCE, 27.

1. A judge at *niſi prius* has no equitable juriſdiction, and can only look to the ſtrict legal rights of the parties upon the record. Therefore, if in an action for goods ſold, the defendant proves *a receipt in full* ſigned by the plaintiff, evidence cannot be admitted by way of anſwer to this defence, that the plaintiff had aſſigned all his effects for the benefit of his creditors; that the action was brought by his truſtees in his name; that no money paſſed when the receipt was given; and that the plaintiff on the record, and the defendant had colluded together to defeat the action;—although, upon an application to the court *in banco*, it might have interpoſed to prevent the defendant from availing himſelf of a receipt optained under ſuch circumſtances. *Alner* v. *George*, 392
2. Where a receipt in full has been obtained by fraud or miſrepreſentation, it will be conſidered as a nullity. *Benſon* v. *Bennett*, 394 *n.*

RELEASE.

1. A general releaſe in the common from diſcharges the releſſee of all actions in reſpect of any thing that has happened before the date of the releaſe, although the cauſe of action was not then complete. Therefore in an action by the payee againſt the drawer of a bill of exchange, ſuch a releaſe to the aeceptor, who had become bankrupt and obtained his certificate, renders him a competent witneſs for the defendant. *Scott* v. *Lifford*, 249
2. If an intereſted witneſs is to be rendered competent by a releaſe, the releaſe muſt either be produced in court, or evidence muſt be given of its being deſtroyed. *Corking* v. *Jarrard*, 37

S

SALE.

1. In the ſale of goods by ſample, if the bulk does not accord with the ſample, the purchaſer is not bound to accept or pay for the goods, on any terms; although no fraud was intended on the part of the vendor, and although the cuſtom may have been that, under ſuch circumſtances, the bargain ſhall ſtand good, upon an allowance being made for the inferiority. *Hibbert* v. *Shee*, 113
2. As ſoon as the purchaſer of goods diſcovers that they do not anſwer the order given for them, he ought to return them to the vendor, or ſend him notice to take them back; and if he does neither, he cannot afterwards maintain an action on the ground of the article being quite unfit for the purpoſes for which he ordered it. *Fiſher* v. *Samuda*, 193
3. If goods are ſold, to be paid for in 30 days, and if not carried away at the end of that time, warehouſe rent to be paid for them,—the property in the goods veſts abſolutely in the purchaſer, and they remain at his riſk, from the moment of the ſale. *Phillimore* v. *Barry*, 513
4. If it is provided by conditions of ſale, that any error or miſ-ſtatement in the *particular* ſhall not vitiate the ſale,

ſale, but that an allowance ſhall be made for it in the purchaſe money, this will be extended only to any error or miſ-ſtatement inſerted through ignorance or inadvertency, and the ſale will ſtill be vitiated by a miſ-ſtatement introduced with a view to raiſe the apparent value of the premiſes. *Duke of Norfolk* v. *Worthy*, 340

5. If a perſon orders ſeveral articles from a tradeſman, at the ſame time, though at diſtinct prices, he may conſider the whole as forming one order, and he will not be obliged to accept or pay for any particular article, unleſs all the reſt are furniſhed according to the terms agreed on; but if he accept of any one article, he is precluded from ſaying that the order was entire, and he will be obliged to accept and pay for ſo many as are individually furniſhed according to the contract. *Champion* v. *Short*, 53

SEAWORTHINESS.

See INSURANCE, 13.

SET OFF.

See PRACTICE, 3. PRINCIPAL AND AGENT, 6.

SHERIFF.

See EVIDENCE, 23, 24, 28.

SHIP.

2 In caſe of capture and recapture, the mate, in the abſence of the captain, has a right to hypothecate the ſhip for the purpoſe of paying the ſalvage to the recaptors. *Parmeter* v. *Todhunter*, 541

SLANDER.

See LIBEL.

1. A letter written confidentially to perſons who employed A. as their ſolicitor, conveying charges injurious to his profeſſional character in the management of certain concerns which they had intruſted to him, and in which B., the writer of the letter was likewiſe intereſted, cannot be conſidered a libel, and made the ſubject of an action for damages. *M'Dougall* v. *Claridge*, 267

2 In like manner verbal communications, when confidential, are not actionable. Thus, if A is ſurety for B. to C., A. if acting *bonâ fide*, may lawfully ſtate to C. in an unreſerved manner, his opinion of B.'s conduct and character, whatever the charges may be which he thus imputes to him. *Dunman* v. *Bigg*, 269 *n*.

3. If words *primâ facie* imputing felony, have been uſed in a different ſenſe, they are not actionable. *Thompſon* v. *Bernard*, 48

SPECIAL DAMAGE.

See COSTS.

In an action for falſe impriſonment on board a ſhip, the plaintiff cannot recover as ſpecial damage, the expence he incurred in leaving the ſhip, and taking his paſſage on board another, unleſs the injury continued to the moment of his tranſhipment. *Boyce* v. *Bayliffe*, 58

STAGE COACH.

1. The proprietor of a ſtage coach is anſwerable for the negligence of the driver, from the uſual place of taking up paſſengers, not only till the coach arrives at its place of deſtination, but till the paſſengers are there ſafely ſet down. *Dudley* v. *Smith*, 167

2. The driver of a ſtage coach, before paſſing through any place that is dangerous, is bound to inform the paſſengers of the full extent of the danger; and if he proceeds without giving them this information, the proprietor is liable for any injury they

may thereby ſuffer, which they might have eſcaped by alighting. 167

STAMPS.

See BILLS OF EXCHANGE, 10, 11, 12 INSURANCE, 7.

1. If a *receipt* for money and an *agreement* are written on the ſame piece of paper, this is receivable in evidence as a receipt, if it has a receipt ſtamp, without an agreement ſtamp. *Grey* v. *Smith*, 387
2. A written paper containing a bare acknowledgment of a debt, is good evidence under the money counts, without a ſtamp. *Iſrael* v. *Iſrael*, 499
3. If there are two parts of a written agreement, both executed at the ſame time, but the one ſtamped and the other unſtamped, the unſtamped part is receivable as ſecondary evidence of the contents of the ſtamped part. *Waller* v. *Horsfall*, 501

STATUTES.

ELIZABETH.

43. c. 7. 152

JAC I.

1. c. 15. (Bankrupt) 271. 279
21. c. 16. 394

CAR. II.

29. c. 3. § 3. (Statute of Frauds) 318
§ 4. 242
§ 17. 233. 235 *n.* 514

ANNE.

12. c. 16. (Uſury) 149. 157. 445.

GEO. I.

3. c. 11. (Gamekeeper) 457
6. c. 18. (Bubble act) 547. 549 *n.*

GEO. II.

5. c. 30. (Bankrupt) 30. 487
8. c. 13. (Copy-right) 94
30. c. 24. (Falſe Pretences) 212

GEO. III.

12. c. 79. (Pancras Paving Act) 9
17. c. 57. (Copy-right) 94
23. c. 58. (Stamps) 502
28. c. 56. (Policies of Inſurance) 538
34. c. 73. (Catholic Oaths) 218
39. c. 58. (Porter's Act) 212
43. c. 57. (Convoy Act) 532
45. c. 89. (Forgery) 324
46. c. 135. (Sir Samuel Romilly's Act) 490. 492 *n.*
47. c. (Militia) 401

STOPPING IN TRANSITU.

See BILL of LADING.

1. If A. ſells goods to B. and according to B.'s directions ſends them to C. a wharfinger, to be by him forwarded to B.; while they are in C.'s hands they may be ſtopped *in tranſitu* by A. *Smith* v. *Goſs*, 282
2. The right of a conſignor to ſtop goods *in tranſitu* is not diveſted by the goods, while in their tranſit, being attached by proceſs out of the court of the Mayor of London at the ſuit of a creditor of the conſignee, *Ib.*
3. Although goods are ſtopped *in tranſitu*, the vendor, after the credit has expired, may recover for them, under a count for goods bargained and ſold, if he was ready to deliver them on the price being paid. *Kymer* v. *Suwercropp*, 109. 180 *c.*
4. If after goods are ſold, they remain in the warehouſe of the vendor, and he receives warehouſe rent for them, this amounts to a delivery of the goods to the purchaſer, ſo as to put an end to the vendor's right of ſtopping them *in tranſitu*. *Hurry* v. *Mangles*, 452

SUBPŒNA DUCES TECUM.

1. Although a paper may be in the legal cuſtody of A, if it is in the actual poſſeſſion of B., *he* is bound to produce it, under a *ſubpœna duces tecum*. *Amey* v. *Long*, 14. 180 *a.*
2. It is no objection to an action for not producing a paper under a *ſubpœna duces tecum*, that the defendant being called as witneſs, had ſworn at the former

mer trial, that he had it not in his poſſeſſion, and knew nothing of it. *Ib.* 16

TENANTS IN COMMON.

See EJECTMENT.

TENDER.

1. If to a plea of tender the plaintiff replies *a ſubſequent demand and refuſal*, it is incumbent on him to prove, that after the tender admitted in the pleadings, he demanded of the defendant the exact ſum ſpecified as having been before tendered and refuſed. *Spybey* v. *Hide*, 181
2. A tender of money to an agent authorized to receive payment, is a good tender to the creditor himſelf. *Goodland* v. *Blewitt*, 477
3. The demand of a debt, to do away the effect of a tender, muſt be by ſome one authorized to give the debtor a diſcharge. *Coles* v. *Bell*, 478 *n*

TITHE.

Before ſetting out the tithe of hay, the occupier of the ſoil is bound at common law to *tedd* the graſs, (or throw it abroad from the ſwathe and gather it together again), and then to make it into cocks; after which, the tithe is to be ſet out, and the parſon muſt make it into perfect hay. *Newman* v. *Morgan*, 305

TRESPASS.

1. If A. ſtates poſitively to the commander of a preſs-gang, that B. is liable to the impreſs ſervice, who in truth is not ſo, and B. in conſequence of this information, is impreſſed, A is liable to an action of treſpaſs and falſe impriſonment at the ſuit of B. *Flewſter* v. *Royle*, 187
2. If while A. is unlawfully impriſoned by B., C. commits an aſſault upon him, C. is guilty of the falſe impriſonment as well as B., and if A. ſues both ſeparately, the pendency of one ſuit may be pleaded in abatement of the other. *Boyce* v. *Douglas*, 60
3. If the owner of a ſhip, being himſelf on board, and ſtanding at the helm unintentionally runs her againſt another ſhip, from unſkilful management,—the remedy is *treſpaſs* and not *caſe*. *Covell* v. *Laming*, 497

TROVER.

See EVIDENCE, 17. LIEN, 3.

1. If A. ſends goods by B. a common carrier, to be delivered to C., proof that B. aſſerted he had delivered the goods to C., whereas in truth C. had never received them, is not ſufficient evidence of converſion to ſupport trover againſt B. *Atterſol* v. *Briant*, 409
2. In trover for bank notes, to prove that they belonged to the plaintiff, the evidence was, that they had been delivered out by a banker's clerk (to what perſon he could not tell) in payment of a cheque which was payable to the plaintiff or bearer. This held to be *primâ facie* evidence of property. *Greenſtreet* v. *Carr*, 551
3. In trover for a deed, the evidence of converſion was, that when the deed was demanded from the defendant, he ſaid, he would not deliver it up, but that it was then in the hands of his attorney, who had a lien upon it. This held inſufficient. *Smith* v. *Young*, 439

TWO-PENNY POST.

See BILLS OF EXCHANGE, 24.

V.

VARIANCE.

See BILLS OF EXCHANGE, 29. PLEADING, 3.

1. In covenant on a leaſe, a miſtake in the name of the perſon ſtated in the demiſe as *late tenant of the premiſes*, is

is a fatal variance. *Bowditch* v. *Mawley*, 195

2. It is not a fatal variance from a record, to omit the *description* of a person named in it, unless some ambiguity is thereby produced. *Amey* v. *Long*, 15

3. In convenant, if after a plea of non est factum, the defendant at the trial admits *the due execution of the specialty mentioned in the declaration*, he may still take advantage of a variance. *Goldie* v. *Shuttleworth*, 70

4. In an action for false imprisonment, the declaration averred that plaintiff was a constable of a particular parish, and in the due execution of his said office as such constable; but it appeared that though a constable inhabiting and acting in this parish, he was elected by the leet jury, and sworn in to serve for a whole liberty, of which the parish formed a part; *held* to be a fatal variance. *Goodes* v. *Wheatly*, 231

5. An indictment for obtaining money by false pretences stated, that the defendant pretended *he had paid a sum of money into the Bank of England.* It appeared that he said generally, *the money had been paid into the Bank of England.* Held to be a fatal variance. *Rex* v. *Plestow*, 494

6. An indictment for perjury in a written deposition before a magistrate, in which a word necessary to the sense had been omitted, in setting out the *substance* and *effect* of the deposition, supplied a word according with the sense, as if it had actually stood in the deposition. Held to be a fatal variance. The deposition should have been literally set out, and the meaning explained by an *innuendo*. *Rex* v. *Taylor*, 404

7. An averment in an information for contemptuous behaviour to a court, that the court consists of A. B. and C. is made out by a bye-law, enacting, that A. B. and C. are sufficient to hold the court, although others may be present and act as members of it. *Rex* v. *Campbell*, 91

8. In an action for a nuisance to a dwelling-house the declaration stated, that at the time of committing the grievance plaintiff was seised in fee of the dwelling-house, and that it was then *in the possession and occupation of a certain tenant or certain tenants thereof under plaintiff.* It appeared that plaintiff was seised in fee for the use of the inhabitants of a particular parish, and that the house was occupied by the parish paupers and a person appointed by the parish officers to take charge of them. Held that neither the poor, nor the master of the workhouse, could be considered as *tenants* to the plaintiff, and that this was a fatal variance between the declaration and the evidence. *Martin* v. *Goble*, 320

VENDOR AND PURCHASER.

See MONEY HAD AND RECEIVED, 2. SALE.

USAGE.

See INSURANCE, 3, 4, 5.

USE AND OCCUPATION.

See CORPORATION.

USURY.

1. Although a bill of exchange, *primâ facie*, appears to be usurious, if this is shewn to have arisen from the mistake of an agent employed in the framing of the bill, (or, *comme semble*, even by his deliberate act, the principals being ignorant of the intended usury) it is not within 12 Ann. c. 16., and the holder may recover what is *bonâ fide* due upon it. *Glasfurd* v. *Laing*, 149

Q Whether

2. *Q.* Whether, if money is lent at uſurious intereſt, a ſubſequent contract to repay the principal with legal intereſt be void under 12 Ann. c. 16. §. 1. *Barnes* v. *Headley*, 157. 180 *d.* *Wright* v. *Wheeler*, 165 *n.*
3. If a bill of exchange is drawn upon an agreement between one of the original parties to it and a perſon not a party to it, that the latter ſhall get it diſcounted by another perſon likewiſe not a party to the bill, upon uſurious terms, and it is ſo diſcounted accordingly, the bill is void for the uſury, in the hands of an innocent indorſee. *Young* v. *Wright*, 141
4. A perſon accommodating another by accepting a bill, cannot, like a country banker diſcounting a bill, take any thing above 5*l.* *per cent.* intereſt, by way of commiſſion, without committing uſury. *Kent* v. *Lowen*, 178
5. Where money is lent by a cheque upon a banker, without a previous agreement to conſider the cheque as caſh, there is no loan or forbearance within the ſtatute of uſury, till caſh is actually received for the cheque. Therefore, in debt on 12 Ann. ſt. 2. c. 16. where the declaration ſtated, that the defendant forbore a ſum of money from the *20th of April*, and it appeared, that having previouſly received at his reſidence in the country a bill to be diſcounted for a houſe in London, he, on the *20th*, ſent off a letter for them by the poſt, inclоſing caſh notes or cheques on London bankers for the ſum in queſtion, which did not reach London till the *21ſt*,—this was held to be a fatal variance. *Brooke q. t.* v. *Middleton*, 445

W

WARRANTY.

&c. PRINCIPAL AND AGENT, 3.

WASTE.

1. It is waſte for an outgoing tenant of garden ground to plough up ſtrawberry beds in full bearing, although when he entered he paid for them on a valuation to the perſon who occupied the premiſes before him, and although it may have been uſual for ſtrawberry beds to be appraiſed and paid for as between outgoing and incoming tenants. *Watherell* v. *Howells*, 227
2. An action on the caſe in the nature of waſte lies at the ſuit of a landlord againſt his tenant for acts done by the latter while holding over after the expiration of a notice to quit. *Burchell* v *Hornſby*, 360

WATERCOURSE.

After twenty years uninterrupted enjoyment of a ſpring of water, an abſolute right to it is gained by the occupier of the cloſe in which it iſſues above ground, and the owner of an adjoining cloſe cannot lawfully cut a drain, whereby the ſupply of water to the ſpring is diminiſhed. *Balſton* v. *Benſted*, 463

WAIVER.

It is not an entire waiver of a condition to be paid for goods *on delivery*, that the vendor allowed the purchaſer to carry away part of the goods without being paid for them. *Payne* v. *Shadbolt*, 427

WITNESS.

1. An honorary obligation, which will be affected by the event of the cauſe, is not an objection to the competency of a witneſs. *Pedderſon* v. *Stoffles*, 144
2. In an action for running againſt plaintiff's cart with a dray, the ſervant who was driving the cart when the accident happened is not a competent witneſs for the plaintiff without a releaſe. *Miller* v. *Falconer*, 251
3. In an action for a deceitful repreſentation of the credit of a third perſon, that

that perſon is a competent witneſs for the plaintiff. *Richardſon* v. *Smith*, 277

4. In an action at the ſuit of a tenant claiming a right of common over a piece of waſte land, againſt the owner of an adjoining cloſe, for not repairing an intervening fence, the landlord under whom the plaintiff holds the premiſes, in reſpect of which he claims the right of common, is not a competent witneſs to prove the right. Neither in ſuch an action are others who have a ſimilar right of common, competent witneſſes for that purpoſe. *Anſcomb* v. *Shore*, 290

5. In an action at the ſuit of a leſſor againſt his leſſee, for not cultivating a farm according to covenants contained in the indenture of leaſe, a ſubleſſee of part of the premiſes is a competent witneſs to prove performance of the covenant on the part of the defendant. *Wiſhaw* v. *Barnes*, 341

6. In an action at the ſuit of an executor or adminiſtrator, if the eſtate of the teſtator or inteſtate is inſolvent, a perſon who has an unſatisfied demand upon it, is not a competent witneſs for the plaintiff. *Craig* v. *Cundell*, 381

7. In an action by the indorſee againſt the drawer of a bill of exchange drawn without conſideration, the payee who indorſed it to the plaintiff, in payment of goods, is a competent witneſs to prove the conſideration for the indorſement. *Shuttleworth* v. *Stephens*. 408

8. But in an action by the indorſee againſt the maker of a promiſſory note without original conſideration, if the maker has become bankrupt and obtained his certificate ſubſequently to the date of the note, he is not a competent witneſs for the defendant. *Maundrell* v. *Kennet*, 408 *n*.

9. In an action for ſeducing the plaintiff's daughter *per quod ſervitium amiſit*, the plaintiff cannot examine witneſſes to the daughter's general character, except in anſwer to evidence of *general bad character* adduced on the part of the defendant. *Bumfield* v. *Maſſey*, 46

10. Evidence to ſupport the character of a witneſs is not admiſſible, unleſs fraud is expreſsly imputed to him. *Biſhop of Durham* v. *Beaumont*, 20

11. But if the validity of a will is diſputed on the ground of fraud, evidence may be given in favour of the character of the deceaſed atteſting witneſſes, 209

12. If an atteſting witneſs to a deed confeſſes *in extremis* that it is a forgery, this confeſſion may be given in evidence to defeat the deed, 21

13. What ſufficient evidence of a witneſs being abroad, to let in his examination upon interrogatories, 17

14. What ſufficient evidence of the atteſting witneſſes to a deed being out of the country, to let in evidence of his handwriting, 304

15. Upon a queſtion concerning the ſeaworthineſs of a ſhip, after the evidence of perſons who have examined her condition, experienced ſhipwrights who never ſaw her may be called to ſay whether upon the facts ſworn to, ſhe was in their opinion ſeaworthy or not. *Beckwith* v. *Sydebotham*, 117

16. A leading queſtion may be put, when it is neceſſary to contradict a witneſs on the other ſide, as to the contents of a paper, which has been deſtroyed. *Courteen* v. *Touſe*, 43

WORDS.

See EVIDENCE, 5. SLANDER.

END OF VOL. I.

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